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J. Hargrave

R E P O R T S

O F

C A S E S

ARGUED and DETERMINED

IN THE

COURT OF KING'S BENCH

From *Michaelmas* Term 31st George III.

T O

Trinity Term 32d George III.

INCLUSIVE.

With TABLES of the NAMES OF CASES and PRINCIPAL MATTERS.

By CHARLES DURNFORD AND EDWARD HYDE EAST,
OF THE TEMPLE, ESQRS.
BARRISTERS AT LAW.

*Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum.*

HORAT.

VOL. IV.

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A

T A B L E

OF THE

C A S E S R E P O R T E D

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JUDGES

JUDGES OF THE COURT
Of King's Bench

During the Time of these REPORTS.

Right Honourable LLOYD, Lord KENYON, Lord Chief Justice.

Honourable Sir WILLIAM HENRY ASHHURST, Knt.

Honourable Sir FRANCIS BULLER, Bart.

Honourable Sir NASH GROSE, Knt.

Sir ARCHIBALD MACDONALD, Knt. Attorney-General.

Sir JOHN SCOTT, Knt. Solicitor-General.

ERRATA ET ADDENDA.

Page

51. l. 8. for "yeards" read "years"
 71. n. (a) 16 Geo. 2. c. 18. for "f. 4." read "f. 3."
 — n. (b) after "alluded" dele ";"
 72. l. 33. for "Sabter" read "Salter"
 — n. (d) for "3 Lev. 134." read "3 Lev. 104."
 151. l. 31. for "he" read "be"
 254. n. (b) before "Salk." dele "5."
 280. l. 29. for "intestate" read "administrator"
 368. l. 24. after "recommending" add "to"
 — marg. l. 14. for "no" read "an" and add at the end "which was dismissed"
 499. l. 2. for "fummoning" read "fumming"
 504. l. 17. for "being" read "between"

Page

525. l. 16. before "Court" add "county"
 565. l. 7. for "released" read "renounced"
 569. l. 21. for "though" read "it being"
 611. l. 16. for "becaufed" read "because"
 685. l. 11. } for "the defendant's" read
 686. l. 22. } "Brown's"
 687. l. 3, 4. }
 714. l. 21. after "time" add "but after the counter-bond was forfeited"
 719. l. 17. for "Melcher" read "Mellor"
 724. l. 1. for "that in September 1789." read "in September 1789, that"
 735. l. 38. for "by the Master" read "for the apprentice"
 758. l. 33. for "tend" read "tender"

ERRATUM IN THE THIRD VOLUME.

Page 541. l. 24. for "Taylor" read "Tyler"

CASES.

C A S E S

ARGUED and DETERMINED

IN THE

Court of KING'S BENCH,

IN

Michaelmas Term,

In the Thirty-First Year of the Reign of GEORGE III.

Regula generalis. **I**T IS ORDERED That the Clerk of the Rules of this Court shall, for the future, keep a Book in which shall be entered all the Rules which from Time to Time shall be delivered out in Ejectments, instead of the present Book, containing a List of the Ejectments moved; in which Book shall be mentioned the Number of the Entry, the County in which the Premises lie, the Names of the nominal Plaintiff, the first Lessor of the Plaintiff (with the Words "and others" if there be more than one,) and also the Name of the casual Ejector. AND IT IS FURTHER ORDERED That unless the Rule for Judgment shall be drawn up and taken away from the Office of the Clerk of the Rules within Two Days after the End of the Term in which the Ejectment shall be moved, no Rule shall be drawn up or entered in the Book, nor shall any Proceedings be had in such Ejectment.

JOHNSON against BANN.

THIS action, which was brought to recover a wager of 5*l.* on the event of a horse-race, was tried at the last *Chester* Assizes; when, it appearing that the bet had been made on a horse-race

stake than 50*l.*, no action to recover a wager on such a race can

Wednesday,
Nov. 10th.
The Stat. 13
Geo. 2. c. 19.
s. 2. having
prohibited
horse-races
for a smaller
be supported.

1790.

JOHNSON
against
BANN.

for a smaller sum than 50*l.* it was objected by the defendant's counsel that, as the subject of the wager was illegal, the wager itself was bad in law; and the Chief Justice of *Chester*, being of that opinion, nonsuited the plaintiff.

Leycester now moved to set aside the non-suit; contending that as it was now determined, in *Good v. Elliott* (a), that wagers in general were legal, unless in some particular excepted cases, and as this wager did not come within either of those exceptions, the action might be supported. It is there said (b) that a wager is legal, unless it tend to a breach of the peace or to immorality, or unless it affect the interest and feelings of a third person, or expose him to ridicule, or libel him, or unless it be against sound policy: Now this wager is not void on either of those grounds. But

Per Curiam. It is sufficient, without adverting to cases, to say that the horse-race itself is prohibited by statute (c); and as the race which is the subject of the wager is illegal, so also is the wager.

Rule refused.

(a) *Ante*, 3 vol. 693.

(b) 695.

(c) 13 Geo. 2. c. 19. s. 2.

Friday,
Nov. 12th.

Houses, built on lands embanked from the *Thames*, in pursuance of 7 Geo. 3. c. 37, which vests those lands in the owners free from taxes, are not liable to be assessed to the general land-tax imposed by 27 Geo. 3. though such act is conceived in general terms, and is subsequent in point of time to the act creating the exemption.

WILLIAMS against PRITCHARD.

TRESPASS for taking the plaintiff's goods; plea the general issue. At the trial at *Guildhall*, at the Sittings after last *Easter* Term, before Lord *Kenyon*, the jury found a verdict for the plaintiff, subject to the opinion of this Court, on the following case.

The plaintiff's dwelling-house stands on the ground which was formerly part of the ground and soil of the river *Thames*, inclosed and embanked in pursuance of 7 Geo. 3. c. 37. and paying the quit rent imposed by that statute, which was passed "for completing the bridge across the river *Thames*," &c. The house was built thereon after the making of the embankment. The defendant was regularly assessed in respect of his house to the land-tax under the land-tax act, 27 Geo. 3.; and for non-payment the defendant distrained in the regular way. The plaintiff at the time of the assessment and distress was neither the owner nor proprietor of the ground whereon his house is erected, but he occupied the house as tenant only.

This

This case was argued in last *Trinity* term by *Williams* for the plaintiff, and by *Lawes* for the defendant. The Court took time to consider of the question; and now

1790.

WILLIAMS
against
PRITCHARD.

Lord KENYON, Ch. J. delivered the opinion of the Court.

This question depends on the exposition of the statute 7 *Geo.* 3. c. 37. "for completing the bridge across the river *Thames* &c."; the 51st section of which (after enabling private persons to enclose and embank at their own expence under the direction of the mayor &c. of *London*) enacts that "the ground and soil of the said river so to be inclosed and embanked in the front of every such respective wharf or ground should vest, and the same was thereby vested, in the owner or owners, proprietor, or proprietors, of such adjoining wharf or ground, according to his her or their respective estates, trusts, or interests therein, *free from all taxes and assessments whatsoever.*" And the question is whether this house, which has been built on soil recovered from the river, be liable to be assessed to the land-tax, levied under an act passed *since* that time. It cannot be contended that a subsequent act of parliament will not control the provisions of a prior statute, if it were intended to have that operation: but there are several cases in the books to shew that where the intention of the Legislature was apparent, that the subsequent act should not have such an operation, there, even though the words of such statute, taken strictly and grammatically, would repeal a former act, the courts of law, judging for the benefit of the subject, have held that they ought not to receive such a construction. In *Bro. tit. "Parliament"* 52. is this passage; "where a statute is that the merchant shall import bullion of two marks for every sack of wool exported, and then another statute was made that the merchant should not be charged unless for the ancient custom only, this does not repeal the first statute; *Vi. causam, ib.* "4 *Ed.* 4. 12". And the reason is that it clearly was not the intention of the Legislature that it should have that effect. So here, though (strictly speaking) the land-tax is an annual statute, and the words of the land-tax act, which was passed in the 27th year of this reign, are general and sufficiently large to subject these lands to the payment of the tax in question, yet, as the land-tax is one of the ways and means for raising the supplies every year, and is now become part of the constant resources of the country, the Legislature in passing the 27 *Geo.* 3. could not intend to repeal the provisions

1790.

WILLIAMS
against
PRITCHARD.

sions of the 7 Geo. 3. which exempted these lands from the land-tax. Considering then that the Legislature did not mean to repeal this part of the 7 Geo. 3., considering also that this precise question has been already determined (a), we think ourselves warranted in saying that the plaintiff is not liable to be assessed to the land-tax in respect of his house.

Postea to the plaintiff (b).

(a) In *Yerraway v. Constable*, E. 20 G. 3. | case reserved.

this very question was decided on a special | (b) See the next case.

Friday,
Nov. 12th.

EDDINGTON against BORMAN (a).

Houses built
on land em-
banked from
the Thames
in pursuance
of the 7 G. 3.
c. 37. are
not liable to
be assessed to
rates made
under the
11th of G. 3.
c. 29.

IN trover for goods a verdict was taken for the plaintiff, subject to the opinion of this Court on the following case.

The plaintiff is an inhabitant and occupier of a dwelling-house, situate in the parish of St. Anne, Blackfriars, in the ward of *Faringdon Within*, in the city of London, which stands on the ground which was formerly part of the ground and soil of the river Thames, enclosed and embanked in pursuance of, and paying the quit-rent imposed by, the act 7th Geo. 3. c. 37; which house was built thereon after the making of the said embankment. The defendant regularly distrained the plaintiff's goods for not paying a rate made under the 11 Geo. 3. c. 29. intitled "An act for consolidating, extending, and rendering more effectual, the powers granted by several acts of parliament, for making, enlarging, amending, and cleansing, the vaults, drains, and sewers, within the city of London, and for paving, cleansing and lighting the streets &c." The former occupier of the plaintiff's house, which was occupied only for a short time before the year 1788, was assessed to and paid the poor's-rate, as also the house-tax, commutation-tax, consolidated-rate, church-rate, tythes, watch, and orphan's, tax: and the present occupier has in like manner been assessed to, but has resisted the payment of, all such rates, upon the ground of his being exempt therefrom by the 7 Geo. 3. c. 37. The plaintiff's house has been regularly assessed to the land-tax, but the payment thereof has been resisted, and is now in litigation. The street, place, or square, in which the plaintiff's house is situate, has been regularly paved cleansed and lighted by the commissioners under the authority of the act of the 11 Geo. 3.

(a) See the preceding case.

Luders

Luders for the plaintiff, said that the plaintiff's exemption from the rate in question followed, of course, from the determination of the preceding case, by which he is entitled to be exempted from the land-tax; for by *sect. 41.* the assessments are directed to be made upon occupiers of land and houses &c, "And who by the laws now in being are or shall be liable to be rated towards the relief of the poor; *such rates to be ascertained by the rates at which such lands, houses, &c, shall be assessed towards the land-tax.*" As therefore the plaintiff is exempted from the land-tax, he is also necessarily exempted from *this tax, which is to be ascertained by the assessment to the land-tax, under the positive words of the above clause.*

Mingay, contra. These rates are personal, and therefore do not depend on the land-tax: for though the *land* itself be not chargeable to the land-tax, yet the *persons*, who inhabit the houses built on that land, are. They all derive a benefit under the 11 *Geo. 3.* for lighting and paving the streets. If the case of *Williams v. Pritchard* had received a different determination, it would have fixed this plaintiff's liability; but it does not follow, that, because the land is exempted from the land-tax, the occupiers are not liable to those taxes which are imposed in respect of the persons.

Lord KENYON, Ch. J. This question seems concluded by the last case. In that the difficulty arose from the circumstance of the land-tax being an annual act, and that the act, under which the distress was taken, was passed subsequent to the statute containing the exemption. But this act of parliament, in describing the persons who are liable to be rated, refers to the poor-rates, which have existed ever since *Elizabeth's* time, as well as to the land-tax. Nor is there any foundation for the argument, that the occupiers of houses are liable though the lands be exempted. The stat. 7 *Geo. 3. c. 37.* enacts that the lands to be enclosed and embanked shall vest in the owner &c, "*free from all taxes and assessments whatsoever.*" If then the lands themselves be exempted, so must also the houses built thereon.

Per Curiam,

Postea to the plaintiff.

1790.

Friday,
Nov. 12th.

The owner of stables in the parish of Marybone, rented by the colonel of a troop of horse, by the authority of the king, for the use of the troop, is liable to be assessed for them to the rates collected in that parish under the 10th of Geo. 3. c. 23.

ECKERSALL *against* BRIGGS.

TO this action of trespass, for taking the plaintiff's goods, the defendant pleaded the general issue; and on the trial a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

By indenture of lease dated 22d September 1787 between the plaintiff of the one part, and the Marquis of Lotbrian, captain and colonel of his majesty's first regiment of life-guards of the other part, (reciting that his majesty, by his sign manual, had been pleased to direct and authorise the Marquis of Lotbrian *on his Majesty's behalf* to accept and take a lease of the stables, riding-house, and premises thereafter mentioned, for twenty-one years,) the plaintiff demised all those stables and riding-house then and now occupied by his majesty's first regiment of horse guards, situate on the East side of Portman Street, Marybone, with the appurtenances, *To hold to Lord Lotbrian and the captain and colonel of the troop for the time being* for twenty-one years, at the yearly rent of 273 *l.* 11 *s.* 9 *d.* payable to the plaintiff quarterly, clear of all taxes, rates, charges, and assessments, then charged, or at any time thereafter to be charged, on the said stables, or on the rent, or on the plaintiff in respect thereof, or on Lord Lotbrian, or any other colonel of the regiment for the time being in respect of the premises by authority of parliament or otherwise howsoever: and the Marquis covenanted to pay all the said taxes, rates, and assessments. The horses belonging to the troop are kept in the stables and riding house, and are attended and taken care of by the soldiers of the regiment: no person resides at the stables, nor is there any room or apartment therein for any such purpose, but a corporal's guard of four men belonging to the regiment sits up with the horses during the night. The rent of the stables is paid by the agent of the regiment out of the money voted by parliament for army services; the fund allowed for the regiment is accounted for by the colonel, and if any saving arise from the regiment not having their full complement of men, or of horses, such saving reverts back to the Public, and is applied in payment of army services. The plaintiff was rated and assessed at 22 *l.* 3 *s.* 7 *d.* by the commissioners for putting in execution a certain act of the 10 Geo. 3. c. 23. intituled, "An act for the more effectual paving, repairing &c, the streets &c, within the parish

parish of *Marybone*," as the owner of the said stables and riding-house, for and towards the purposes of paving &c, for one year ending the 31st of *December* 1788. The plaintiff refused to pay his rate; and the defendant, who is a collector of the rate, by virtue of a warrant under the hands and seals of two justices &c, took the goods in the declaration mentioned. The question for the opinion of the Court is whether the plaintiff be liable to pay the rate under the act of parliament.

1790.

ECKERSALL
against
BRIGGS.

By section 93, it is enacted that "one or more rate or assessment shall, for the purpose of repairing &c, the streets &c, be made upon all and every person and persons who do or shall inhabit, use, occupy, possess, or enjoy, any land, ground, house, shop, warehouse, coachhouse, stable, cellar, vault, building, tenement, or hereditament, in any of the said squares, streets, &c." By section 105. "Forasmuch as it is reasonable that all public buildings, and all dead walls, and void spaces of ground, shall be rated and assessed in a due proportion towards the paving, &c, it is hereby further enacted that it shall and may be lawful to and for the said commissioners, at their discretion, and they are hereby required, from time to time, to rate and assess towards the purposes of this act all parish churches and parochial and other chapels, schools, markets, warehouses, and all other public buildings whatsoever, charged or not charged to the land-tax, situate &c. in any square, &c, within the limits aforesaid, which now is or are, or hereafter may be, built or in building, at a rate not exceeding" &c.; "And [after directing that the churchwardens shall be rated for parish churches] the rate or rates, assessment, or assessments, to be made and paid for any other chapel, meeting-house, school, market, warehouse, or other public building, dead wall, or void space of ground, shall be paid by the respective owner or owners, proprietor or proprietors thereof, and shall be charged and chargeable on the said premises, and be recovered and applied in such manner as other rates and assessments are directed to be recovered and applied by this act."

Baldwin, for the plaintiff, contended that the plaintiff was not liable to be rated for these stables as the owner or proprietor of them, under this statute. By sect. 93. the occupiers of stables are expressly made liable; and in sect. 105, in which the Legislature considered in what instances the proprietors should be liable, stables are omitted. By the latter clause the proprietors are only liable for certain buildings &c, which are not enumerated

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ted in the former one. The Legislature have therefore ascertained for what species of property the proprietors and occupiers are respectively chargeable. The instances mentioned in the latter clause are all buildings of a *public nature*; and the general words which follow "and all other public buildings whatsoever" mean buildings *ejusdem generis*. It is not necessary for the plaintiff to prove that Lord Lothian is liable to be rated, as the occupier: it is sufficient, in order to exempt the plaintiff, to shew that he is not chargeable as the proprietor. Perhaps this was a case not foreseen by the Legislature, and not provided for. But even if it should be considered that the Legislature have provided for every case, and that it be incumbent on the plaintiff, in order to exempt himself, to shew that Lord *Lothian* is assessable in the character of occupier, that may be done by saying he has subjected himself to the payment of this tax by signing the lease; he accepted a lease of these stables in the same manner that any lessee of any other private property would have done; he has admitted that he is the lessee for the payment of rent, and therefore he must be considered as lessee for the purpose of paying the taxes.

Lord KENYON, Ch. J. [stopping *Garrow*, who was to have argued for the defendant;] The words in the first clause, which have been commented upon, and which expressly charge the *occupiers* with this rate, are to be sure extremely general, and would comprehend all sorts of landed property, were they not restrained by the subsequent provisions of the act; for they mention "land, ground, house, shop, warehouse, coachhouse, stable, cellar, vault, building, *tenement* or *hereditament*." But as it was intended to impose the rate on every species of landed property within this district, and as it was foreseen that difficulties would arise in many instances respecting the persons who could be said to occupy particular buildings, the Legislature in order to obviate such difficulties provided by the subsequent clause that the rates on chapels, *warehouses*, and other *public buildings*, should be paid by the *owners* or *proprietors*. The question then is, what is meant by *public buildings*? and that may be answered by saying that those are public, which are applied to *public purposes*. A warehouse may be rated to the proprietor, or the occupier, according to the use to which it is applied. If it be let, for instance, to the excise or custom house for public purposes, the burden must be borne by the proprietor; but if it be afterwards converted to a private use, the occupier of it will be liable to this

this rate. So here the stables in question are used *for a public purpose* by the horse guards, in contradistinction to *private occupation*; and as long as they continue to be used for this purpose, there is no private occupier of them. On this ground proceeded the case of Lord *Amberst* v. Lord *Sommers* (a), (with which decision I perfectly coincide) where Lord *Amberst*, as colonel of the second troop of horse guards, was held to be exempt from the payment of the poor-rate imposed upon some stables occupied by the horses belonging to the troop. Lord *Amberst* could not in any sense be considered as the occupier, so as to be liable to be rated, neither could the soldiers. So here whilst these stables continue to be used by the guards, they cannot be considered to be in the *private occupation* of any one, but are *public buildings* within the meaning of the latter section of the act. And that clause cannot be confined (as has been contended) to subjects not enumerated in the former one; because then it would have no operation whatever, since the former section mentions "hereditaments" which includes every species of landed property.

ASHHURST, J. It clearly was the intention of the Legislature, when this act of parliament was framed, that no real property within this district should be exempted from the rates imposed by it. The property must be charged to some person or other. If it be occupied by *private persons*, the rate must be paid by the occupier; if converted to a *public purpose*, by the proprietor. But the same buildings, which have been occupied by private persons, may become public buildings within the meaning of this act of parliament, from the kind of occupation. Now here Lord *Lothian* cannot be considered as the occupier of these stables, because they are converted to a public purpose; then it follows that, as these buildings are liable in the hands of some person, the *onus* must fall on the proprietor, by the latter section of the statute: if they should hereafter be in private occupation, the rates must again be paid by the occupier.

BULLER, J. I confess that, when I first read this case, it struck me in a different light: I thought that the words in the latter clause meant *buildings which were in their nature public*; and that "all other public buildings" following "chapels &c," meant buildings *ejusdem generis*. But I now think that the construction which has been put on the statute is the true one; and that whether a building shall be considered as public or private must

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depend *on the use* to which it is applied. The observation which my Lord has made on the term "warehouse" seems decisive.

GROSE, J. The ground, upon which we decided the case of Lord *Amberst* v. Lord *Sommers*, was that the stables were considered as the stables of the Public. Now in this case the Legislature intended that the proprietors of buildings, which are used by the Public, should pay all rates imposed on them by virtue of this act: and they have expressly charged such proprietors by the latter section.

Postea to the defendant.

Friday,
Nov. 12th.

STEVENSON against YORKE.

If defendant pay money into court, and plaintiff nevertheless proceed to trial where a verdict is given against him, he is not entitled to the costs up to the time when the money was paid into court.

ON the trial of this cause the defendant obtained a verdict; but, as he had paid money into court before trial,

Marryat now moved that the plaintiff should be allowed his costs up to that time, on the authority of *Hartley* v. *Bateson* (a), and *Griffiths* v. *Williams* (b); and that they might be deducted out of the costs to be paid by him to the defendant: in the latter case he observed that a similar rule was made after verdict. But

BULLER, J. said, that though the plaintiff was entitled to the costs up to the time of paying money into court if the application were made before trial, yet that the party came too late after trial; and that that part of the case of *Griffiths* v. *Williams* could not be supported.

Per Curiam,

Rule refused (c).

(a) *Ante*, 1 vol. 629.
(b) *Ib.* 710.

(c) *Vid.* *Stodhart* v. *Johnson*, *ante* 3 vol. 657. See also the next case.

Tuesday,
Nov. 16th.

KABELL against HUDSON (a).

S. P.
If defendant pay money into court, which the plaintiff agrees to accept, he may serve the defendant with notice of an appointment before the Master to tax the costs.

IN this case the defendant paid money into court at the time of pleading, which the plaintiff then took, but proceeded to trial, when he was non-suited. And he obtained a rule, on a former day in this term, to shew cause why he should not have his whole costs, notwithstanding he was non-suited, on the ground that the defendant had not served him with notice of

(a) See the preceding case.

an

an appointment before the Master to have his costs taxed; which

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Erskine now insisted was necessary, according to the practice of the court; in which he was confirmed by the Master.

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Marryat, who opposed this motion, observed that the books of practice did not agree upon this subject; the affirmative being laid down in *Imp. 4 Ed. 224*; and the negative in *Richards. Pract. B. R. 228*; *Harr. Pract. B. R. 93*; and *1 Cròmp. 3 Ed. 143*. Such a rule, if it exist at all, is highly inconvenient; since the defendant must take out three summons and make a tender of the costs afterwards. But even if such a rule do prevail, still the plaintiff has waived it in this instance by taking the money out of court. And that was one of the grounds on which the court decided in *Griffiths v. Williams*. At all events the plaintiff is not entitled to his *whole costs*; and, according to the authority of *Stevenson v. Yorke*, not to *any costs*.

BULLER, J. This is the first motion of the kind that was ever attempted to be made; for it calls on the defendant to shew cause why the plaintiff should not have his full costs, notwithstanding he was non-suited; if the nonsuit cannot be supported, he should have moved to set it aside; but as long as it remains in force, he cannot have his full costs. Neither is he entitled to the costs even up to the time of the defendant's paying the money into court: that was decided the other day. If a plaintiff choose to accept the money when it is paid into court, or even before trial, the court will give him his costs up to the time of paying the money into court: but if he will, notwithstanding, proceed to trial, and fail, he loses all claim to those costs. The rule of practice, which has been relied on in support of the motion, seems inconvenient: but inconvenient and absurd as it may be, we should hold ourselves bound by it, (being only two judges in court). However supposing that such is the established practice, it will not govern this case; for even if the defendant (not the plaintiff) be bound to give notice of the appointment to tax the costs, there is a prior act to be done by the plaintiff, namely, his signifying to the defendant his assent to take the money; for if he will not assent to that, it is nugatory for the defendant to give notice of an appointment which the plaintiff will not observe.

GROSE, J. agreed that it was necessary for the plaintiff to signify his assent to accept the money before the notice of the appointment is served.

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KARELL
against
HUDSON.

Afterwards *Buller*, J. said the Master is now satisfied that it is more convenient that the plaintiff, than the defendant, should give notice of the appointment to tax the costs: therefore let it be understood in future that such is the practice.

Rule discharged.

Saturday,
Nov. 14th.

An appeal
against a
poor-rate
must be
lodged at the
sessions next
after the al-
lowance of it.

The KING against JAMES ATKINS.

A Poor rate was made in *October* 1789, and allowed in the *November* following; against which the defendant appealed to the last *Easter* Sessions, when the appeal was dismissed with costs, because it was not made to the next sessions. The rate and the order of sessions having been removed here by *certiorari*,

The Court, without hearing any argument, confirmed the order of sessions on the authority of the cases of *R. v. Penryn* (a), and *R. v. Micklefield* (b). But

Graham, who originally moved to quash the rate, and who was not in court when this case was called on, on a subsequent day desired that the Court would permit him to renew his motion to quash the rate for an informality appearing on the face of it, it having been made by one overseer only. And he contended that it was competent to the party, complaining of the rate, to take advantage of any defect which appeared on it, notwithstanding the Sessions had properly dismissed the appeal, because it had not been lodged in time. The proceedings below are now before the court; and they will not suffer a rate, which is allowed to be apparently illegal, to be confirmed here. In *R. v. Stanley* (c), where an appeal against an order of bastardy was dismissed upon the ground of its not having been made at the sessions next after service of the order, and the orders were removed here, Mr. *Wallace* objected to the original order for a defect appearing on the face of it, and Mr. *Chambre* on the other side admitting that the order could not be supported, it was accordingly quashed.

BULLER, J. said that in *R. v. Stanley* the Court came to no determination on the point, and that it passed by consent: but here the party objecting to the rate is not entitled to remove it. And, as the order of sessions is right, we cannot do otherwise than confirm it.

Per Curiam,

Order of Sessions affirmed.

(a) *Tr.* 24 *Geo.* 3. B. R. (b) *Hil.* 25 *G.* 3. B. R. (c) *Cald.* 172.

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DOE on the Demise of HENEAGE *against* HENEAGE.Tuesday,
Nov. 16th.

EJECTMENT for lands lying in the county of *Lincoln*, tried before Lord *Kenyon*, at the last Assizes, when a case was reserved for the opinion of the Court; stating

That *Thomas Heneage* deceased (the late grandfather of the lessor of the plaintiff in the ejectment,) being seised in fee of the premises in question, by will dated the 28th *February* 1735, devised the same to his brother *George Heneage*, and to *William Taylor*, and their heirs &c, in trust, as to part of the premises, to the use of his wife *Catherine Heneage* for life in lieu of her dower, remainder to trustees for a term of 500 years, upon certain trusts which never took effect, (and which term hath been since duly surrendered by the trustees,) remainder as to the part before limited to the said *Catherine*, and also as to the parts whereof no use was therein before limited, to the use of his son *George Fieschi Heneage*, by his first wife, for life, remainder to the use of the said *George Heneage*, and *William Taylor*, and their heirs, *during the life of the said G. F. Heneage*, in trust to preserve the contingent uses and estates therein after limited, *nevertheless to permit the said G. F. Heneage, to receive the rents &c, thereof during his life*, remainder to the use of the first and other sons of *G. F. Heneage* successively in tail male, remainder to the use of the devisor's son *Thomas* by his then wife for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the said *Thomas Heneage* (the son) successively in tail-male, remainder to the use of the devisor's third and other sons successively in tail-male, remainder to the devisor's right heirs in fee. In which will is contained the following proviso; "Provided always, and my will "is expressly, that in case it shall happen that my said son *G. "F. Heneage*, or any son or sons of his, to whom the said manors " &c. therein before mentioned are limited as aforesaid, shall "ever inherit or take by descent, or by any gift, grant, or devise, "or otherwise become seised in possession for his or their life or "lives, or for any greater estate, of the whole or so much of the "real estate of my said brother *George Heneage* as shall exceed the "yearly value of the estate by this my will limited in use to him "and them by 100 *l.* by the year, that then and from such time "as my said son *G. F. Heneage*, or any son or sons of his, shall so "inherit, or take by descent, gift, grant, or devise, or otherwise

A. devised to his son *B.* for life, remainder to trustees during *B.*'s life, to preserve contingent remainders, nevertheless to permit *B.* to receive the rents and profits, remainder to the first and other sons of *B.* in tail-male, remainder to *C.*; with a proviso that if *B.* should succeed to the estate of *D.* the limitation of *A.*'s estate to *B.* should cease, and the next in remainder should take as if *B.* were dead; *B.* succeeded to *D.*'s estate before he had a son, and after *B.*'s death; held that the limitation to the trustees continued during the whole of *B.*'s life so as to support the contingent remainders.

I have heard it doubted whether this devise is supportable.

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“ become seised in possession of such or so much of the said
“ real estate of my said brother *George Heneage* as aforesaid, for
“ the term of his or their natural life or lives, or of any greater
“ estate, all and every the use and uses, limitations, and estates,
“ herein before created and declared of and concerning the said
“ manors &c. herein before mentioned, to and for or in favor of
“ my said son *G. F. Heneage*, or any son or sons of his, so coming
“ into possession of such and so much of my said brother's estates
“ as aforesaid, shall cease, determine and be utterly void: And
“ in such case my will and meaning is, that the next in re-
“ mainder according to the uses of this my will shall succeed
“ to and have and enjoy my said estate hereby devised, *as if my*
“ *said son G. F. Heneage, or any such son or sons of his, was or*
“ *were respectively dead*; any thing herein before contained to
“ the contrary thereof in anywise notwithstanding.”

T. Heneage the devisor died on the 18th *May* 1740, leaving the said *Catherine Heneage* since also dead his widow, and *G. F. Heneage* his eldest son and heir at law; whereupon *G. F. Heneage* entered upon the premises limited to him for his life, (except such part as was limited to *Catherine Heneage* for her life, for her jointure.) *Catherine Heneage* died on the 16th *October* 1766, whereupon *G. F. Heneage* entered upon the premises so limited to her for her jointure, and was and continued in possession of all the premises in question until his death, on the 21st *March* 1782. *G. Heneage*, the devisor's brother, who was also seised in fee of several manors &c, by will dated the 20th *July* 1751, devised the same to the use of his nephew the said *G. F. Heneage* for life, remainder to his first and other sons successively in tail-male, with divers remainders over, and with the reversion to his own right heirs. The devisor *George Heneage*, died on the 25th *August* 1753; on which his nephew, *G. F. Heneage*, entered upon the premises devised to him by his uncle's will, and which exceeded the yearly value of the estates above limited to him for life by his father's will by 100*l.* and upwards by the year, and continued in possession till the said 21st *March* 1782, when he died, leaving issue of his body the defendant his eldest son and heir, and the lessor of the plaintiff his second son. At the death of the said *George Heneage* the uncle, *G. F. Heneage* had no son. The defendant was born on the 21st *December* 1768, and the lessor of the plaintiff on the 28th *September* 1771. *G. F. Heneage* had also a son named *George B. Heneage*, who was born on the 17th *March* 1767, and died 10th *May* 1768, before the birth of the defendant. *Thomas Heneage*, (the son of the testator *Thomas Heneage*,

Heneage, named in his will,) died unmarried and without issue, on the 27th February 1751, in the life-time of the said *George Heneage*; and the devisor, *Thomas Heneage*, had no third or other son. The ultimate limitation in the will of the said *Thomas Heneage* to his right heirs was vested in *G. F. Heneage*, as heir of his father *Thomas Heneage*, at the time of the death of the said *George Heneage*, the uncle. Upon the death of *G. F. Heneage*, the defendant his eldest son took by devise, and became and still is seised in possession in tail-male of, the estate of *George Heneage*, (the brother of the said first named devisor *Thomas Heneage*,) under the will of *George Heneage*, and which estate of *George Heneage* exceeds the yearly value of the estate devised by the will of *Thomas Heneage* by 100*l.* by the year and more. Upon the death of *G. F. Heneage*, the defendant also entered upon the premises in question, and is still in possession thereof, and hath never had any issue of his body.

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Coke was to have argued for the plaintiff: but

Sutton, for the defendant, was desired to begin. The event, which determined the particular estate of *G. F. Heneage*, also determined the subsequent limitations expectant upon it, no person being then in *esse* to take; and consequently the defendant is entitled as heir at law to the devisor, his grandfather. The limitation to the trustees to preserve contingent remainders cannot vary this case in favor of the plaintiffs, because their right of entry was only for a particular purpose, namely, to receive the rents and profits, and to pay them over to *G. F. Heneage*: but on the event of the uncle's death, and *G. F. Heneage*'s succeeding to his estate, his right to those rents and profits ceased by virtue of the proviso in his father's will. If the limitation to the trustees had given them a right of entry for all purposes during *G. F. Heneage*'s life, or, as in *Nicolls v. Sheffield* (a), a right of entry for the benefit of the person next in remainder, the subsequent remainders might have been supported. But here the devise to them was for a particular purpose only, which purpose was at an end before the birth of a son of *G. F. Heneage*; for the event of *G. F. Heneage*'s succeeding to his uncle's estate was to have the same effect as his death. Supposing *G. F. Heneage* had had a son born before the death of his uncle, that son would have been entitled to take under the express words of the proviso; then if such son would have had a right of entry, the trustees would have none. But if they had any right of entry under the proviso for the

(a) 2 Bro. Ch. Cas. 217.

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benefit of the person next entitled, such right was inconsistent with the estate before given to them; for the limitation to them was only in trust to receive the rents and pay them to *G. F. Heneage*, and yet under the proviso *G. F. Heneage* was not entitled to receive them. If *G. F. Heneage* had had a son before the uncle's death, that son was to take by the proviso as if the father were dead: but if the trustees had a right to enter, they could only have entered to receive the rents and profits for the use of the father. Either therefore the trustees could not enter at all, or, if they could, their right of entry was (in the event which happened) inconsistent with the trust. The Court, by determining in favor of the heir at law, will not defeat the intention of the deviser, for that has been frustrated already by the event of the uncle surviving his nephew and dying before *G. F. Heneage* had a son. But if it were even necessary to decide contrary to the deviser's intention, still as he has not guarded against this event, which he might have done by a proviso similar to that in *Nicholls v. Sheffield*, the heir at law has a right to take advantage of that defect; and the Court must, as in *Perryn v. Blake*, and *Coulson v. Coulson*, determine against the intention.

Lord KENYON, Ch. J. This is one of those cases on which it is impossible to raise any doubt. It was owing to the anxiety of the parties at the time of the trial, and not to any doubt of my own, that this question was reserved for the opinion of the Court. The general outline of the will, stripped of technical terms, is this; the deviser, who was a younger brother left his estate to his eldest son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, with a proviso that, if the larger estate should descend from the elder branch of the family to his eldest son, his own estate should go to the younger branch of his family: that event did happen, the uncle's estate descended to the deviser's eldest son. The argument now used is, that, notwithstanding such may have been the deviser's intention, he has not used proper limitations to give effect to it: and the objection is that, the particular estate having been determined before the contingent limitations could take effect, those limitations were defeated. But that objection depends on the not giving effect to one of the most important limitations in the will, namely, that to the trustees to preserve contingent remainders *during the life of G. P. Heneage*: Those are the common words inserted in

every

every limitation of this kind; and there is nothing in this will to induce us to imagine that the devisor intended that the estate limited to the trustees should not continue during the whole natural life of his eldest son. Unless therefore the defendant can obliterate those words from the will, or shew that they cannot have any effect, there is an end of his claim: but most unquestionably their estate did continue during the eldest son's life. It is not necessary to decide here who was entitled to the rents and profits after *G. F. Heneage* succeeded to his uncle's estate and before he had a son born: it is sufficient for the determination of this case that the trustees had a right of entry during the whole of *G. F. Heneage's* life, and were to receive the rents and profits, for some purpose.

(a) *BULLER, J.* and *GROSE, J.* of the same opinion.

Postea to the plaintiff.

(a) *Aspburst, J.* was indisposed and unable to attend on this day.

The KING *against* T. PROSSER and Others.

Wednesday,
Nov. 17th.

THE defendants appealed to the Sessions against a poor-rate, because five persons were omitted in the rate, whose names had been ordered, on the hearing of an appeal at a former sessions, to be inserted, and because several other persons, (mentioning them by name) who had rateable property in the parish, were also omitted. The sessions confirmed the rate, and stated the following case.

The counsel for the appellants (besides producing other evidence) offered to call the persons mentioned in the notice of appeal to prove that they were respectively possessed of rateable property within the borough at the time for which the rate was made, and have ever since been in the possession thereof. Those several persons tendered their votes at the last election of members to serve in parliament for the borough of *Leominster* in respect and as the occupiers of the property for which the counsel for the appellants now contended that they ought to have been rated; the right of election for members to serve in parliament for the borough being by the last determination of the House of Commons in the bailiffs, capital burgesses, and inhabitants, of the borough, paying scot and lot. And those several persons, subsequent to the last *Easter* sessions, (which were the sessions next after the making and publishing of the rate in question,

On an appeal against a poor-rate because certain persons were omitted to be rated, a parishioner, who is liable to be rated, but not in fact rated, is a competent witness to prove the rateability of the appellants.

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and prior to the present sessions) having given notices of appeal against the rate now in question, complaining of their having been omitted to be rated in the rate for the said property respectively, and having entered appeals at the present sessions with the proper officer, but which appeals were not received by this court, (of sessions,) the same not having been lodged at the last *Easter* sessions, The counsel for the respondents objected to the testimony of such persons as incompetent; and the question having been argued by the counsel on both sides, this Court (of sessions) are of opinion that such testimony is incompetent, and that the same shall not be received. The counsel for the appellants having also called one *Gabriel Weaver*, to prove that *W. Weaver*, one of the persons so mentioned in the notice, was at the time of making the rate, and also for the time for which the same was made, and still is, possessed of rateable property within the borough, the counsel for the respondents proposed by examination on the *voir dire* to shew that *G. Weaver*, who is not rated in the rate, was possessed of rateable property at the time of making the rate, and at the time for which it was made, and was on that account an incompetent witness; and the counsel for the appellants having objected to such enquiry into the fact of *G. Weaver's* being so possessed &c, as incompetent to the respondents in that case, the Court on hearing the counsel on both sides over-ruled such last mentioned objection; and it appearing by evidence that *G. Weaver* is possessed of property in the borough, equal in value to what other occupiers in the borough are rated in respect of, this Court (of sessions) are of opinion that he is not a competent witness.

Bearcroft, *Plumer*, and *Shepherd*, in support of the order of sessions, contended that the sessions had done right in rejecting the testimony of the persons first mentioned, as the judgment to be given might afterwards be used as evidence in their favor; and also in refusing to hear *G. Weaver*, who was interested in the decision on the rate. As to the first (a): It appears by the case that the right of voting in *Leominster* is in the inhabitants paying scot and lot: and if these persons had been permitted to prove their own liability to be rated, the order of sessions would have been evidence before a Committee of the House of Commons

(a) This point was only spoken to by Mr. *Bearcroft*; the Court, entertaining a strong opinion on the second point, desired the other counsel to confine themselves to that question only; observing that if the sessions had formed a wrong opinion upon that question, it would be sufficient to warrant them in sending the case back to the sessions.

to prove their right of voting. This therefore comes within the acknowledged rule, that where a verdict or judgment can be afterwards given in evidence by the person called as a witness in support of his right, his testimony is inadmissible. Secondly *G. Weaver* was also incompetent; because, though he were not actually rated, he was *liable to be rated*. He was therefore interested in the decision of the sessions; because he came to multiply the number of persons who were to bear the burdens of the parish, and consequently in case of himself. This objection prevails universally in all parochial questions; and it is founded in reason and justice, since otherwise a parish would omit one person, who was liable to be rated, in particular rates for the very purpose of obtaining his evidence in certain cases. Formerly the rule, respecting the admissibility of evidence, required that the person called as a witness should be wholly indifferent; and though in modern times the rule has been considerably narrowed, and the courts have been inclined to let the objection go to the *credit* of the witness rather than to his *competency*, still the rule is that if the party called have a direct interest in the very decision, he is incompetent: and the objection is not confined to those cases only where the party may afterwards use the verdict or judgment in his favor.

Erskine, Piggott, and Douglas, contra, were stopped by the Court.

LORD KENYON, Ch. J. I purposely avoid saying anything upon the first question, as it is not necessary for the decision of this case. But, on the second, if I were aware of any possible interest which the witness *G. Weaver* had, I should hesitate before I held that his testimony was improperly rejected. The poor-rates are made for a short space of time only; they are adapted to the situation of the parish at the time they are made; and persons, who are liable to be rated one month, may not be so in the next. The rateability of one person cannot affect the rateability of another; and therefore, whatever rateable property *G. Weaver* may have had in this parish, yet as his name was not inserted in the rate, his testimony was improperly rejected.

BULLER, J. I have often heard Lord *Mansfield* say that the question whether the evidence be admissible or not depends on the subject matter to which it is applied. Then consider the subject matter here; a number of persons, who insist on being rated, (not wishing to be exempt from paying the rates,) called a witness

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ness who is not rated to prove that they have rateable property in the parish; and it is objected that he is an incompetent witness to prove this fact, because he himself is liable to be rated: but supposing that the appellants succeed in having their names inserted in the rate, it does not follow that the witness ought to be rated; that question will remain untouched, and it must depend on the fact of his having rateable property within the parish. It has been argued that a person, who is liable to be rated only, is equally an incompetent witness, as if he were actually rated: but there is a material difference between the two cases. It has been settled in so many cases at *Nisi Prius* that the liability to be rated is no objection to his being called as a witness, that it is now considered as an established point. The first question on this subject arose before Mr. Baron *Burland*, at *Salisbury*, in an action on a penal statute, which gave part of the penalty to the parish; and a person being called as a witness to support the action, who was liable to be rated to the poor, it was objected that such liability rendered him incompetent; but that learned Judge said that as he was not rated, he had not an immediate interest at that time; and the witness was admitted. The same point has since been repeatedly ruled by different judges. The rule stated by one of the counsel, that the witness is to be totally indifferent at the time when he is examined, is not accurate: if such a rule were to prevail, every objection, which now goes to the *credit* of the witness only, would render him *incompetent*. That rule more properly applies to *jurors*, who are rejected on very slight grounds. I take the rule to be this, that, if the witness can derive no benefit from the cause then before the Court, he is competent.

GROSE, J. In many cases it is difficult to draw the line between competency and credit. But in this case there is no doubt: Here the question is, whether *G. Weaver* had any interest in the appeal at the moment when he was called to be examined; it is said that he was interested, because when another rate is made he will be so: the answer is that, if his name be inserted in the next rate, he will be interested, and consequently incompetent: but he had no interest on this rate to render him an incompetent witness.

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Order of sessions quashed.

The KING *against* The Mayor, &c, of LONDON.

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Wednesday,
Nov. 17th.

THE defendants having been rated for the barge-way and toll-gate in the hamlet of *Hampton-Wick, Middlesex*, appealed against the same to the Sessions, who confirmed the rate, subject to the opinion of this Court on the following case.

Hampton-Wick is a vill maintaining its own poor. The appellants by virtue of the stat. 17 Geo. 3. c. 18, and out of the fund provided by that act, purchased from Sir *William Dolben*, for the sum of 4200*l.*, an ancient barge-way or towing-path within the said hamlet, upon the bank of the *Thames*, and certain antient tolls and duties, payable in respect of horses drawing barges along the same; and such barge-way and tolls were in *January* 1778 conveyed to the appellants for the purposes of the act. The appellants have leased the herbage and pasture of the barge-way or towing-path to Mr. *Spencer*, at an annual rent of 30*l.* 10*s.* 0. which is expressly appropriated to the use of the navigation: and their lessee is in the occupation of the herbage and pasture so leased to him, and pays the several rates for the same. Immediately on the purchase and conveyance, the tolls upon barge-horses were in pursuance of the direction of the act discontinued, and ever since that time the new tolls authorized by the statute to be collected in lieu thereof have been taken by the appellants for all barges and other vessels navigating the river between *London-bridge* and the City Stone above *Staines-bridge*, according to the quantity of tonnage. Barges and other vessels are daily navigated on that part of the *Thames* which is within the hamlet, and adjoins the barge-way; and, under the authority of the act, an additional toll of one halfpenny *per* ton becomes payable, and is paid to the appellants for every barge or other vessel navigating upon the river beyond *Kingston* or *Hampton-Wick*, and towed along the barge-way to *Ditton*, *Hampton Court*, *Moulsey*, or *Hampton*, within part of which limits the barge-way in question is included; and barges from *London* frequently stop and unload within the limits of the barge-way. None of the new tolls are actually received within the hamlet of *Hampton Wick*; but the whole of them collected by the appellants' appointment at *Strand* on the *Green*, below *Kew Bridge*. Sir *William Dolben* and his ancestors, previous to the above purchase and conveyance, were always assessed to the land-tax, poor's-rate, and other taxes for the barge-way and ancient tolls,

A barge-way and toll-gate in the hamlet of *Hampton Wick*, purchased by the city of *London*, by virtue of the 17 Geo. 3. c. 18. (an act passed for more effectually completing the navigation of the *Thames*, and empowering the city to levy tolls and duties towards the charges of the navigation) are rateable towards the relief of the poor in that hamlet for such part of the tolls as becomes due there, notwithstanding the tolls are collected in another parish.

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and constantly paid all such assessments up to the time of such purchase and conveyance; and from the time of such purchase and conveyance the appellants have been regularly assessed in respect of the barge-way and tonnage; and the land-tax and poor's-rate have been several times demanded by the officers of the hamlet, but the appellants have never paid the same. The whole interest which the appellants have in the tolls is derived under the before mentioned act, and purchased under the authority thereof. And the rates appealed against have been duly made, allowed, and published according to law.

The act of the 17 *Geo. 3. c. 18.* is entitled "An Act for enabling the mayor &c. of *London* to purchase the present tolls and duties payable for navigating upon the river *Thames*, Westward of *London Bridge*, within the liberties of the city of *London*, and for laying a small toll in lieu thereof, for the purpose of more effectually completing the said navigation; and for other purposes." The act states that great expences had been already incurred by the city for improving the navigation under the 14 *Geo. 3*; that further sums of money were necessary to be laid out, over and above the annual expences; and it enables them to purchase lands and the several tolls and duties collected for the navigation of barges, and for horses drawing the same: that, immediately after the purchase of such tolls and duties, those tolls and duties should cease; and then it enacts that "in consideration of the great charges and expences the said mayor &c. will be at in improving and completing the said navigation, and for keeping the works in repair, and in purchasing the tolls and duties now collected and taken for barges and other vessels navigating, and for horses drawing &c, it shall and may be lawful to and for the mayor &c, to take for all barges &c, which shall be navigated upon the said river between *London Bridge* and the City Stone above *Staines Bridge*, (except as is hereinafter mentioned,) such sums of money in the nature of a toll or duty as the said mayor &c, shall think proper, not exceeding the tolls and duties hereinafter mentioned." It then states the tolls which might be taken from *London Bridge* to several other places up the river as far as *Staines*, amongst others to *Hampton Wick*, 2*d.* per ton; to *Staines* and upwards, 4*d.* per ton. It also gives the city power to collect the tolls where they please. It then requires that "an account of the said tolls and duties granted by the act, be annually laid before parliament."

"*ment.*" It then recites that the money to be collected by the receipt of the tolls or duties to be made payable by virtue of this act will not be sufficient for the purpose of the act and of the 14 Geo. 3. &c. and then gives power to the city to raise money upon the security of the tolls.

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Erskine, Fielding, and Marryat, in support of the order of sessions. 1st, The corporation of *London* are in the eye of the law the occupiers of this property, and are therefore liable to be rated for it. 2dly, The subject matter is rateable. And 3dly, the tolls in respect of which the defendants are rated became due within the hamlet of *Hampton Wick*. 1st, It is objected that, whether the property be rateable or not, the defendants, are not rateable for it, because it is vested in them by the 17 Geo. 3. c. 18. for *public purposes*, and they are accountable to parliament for the money raised under it. But the objection is not well founded; for it by no means appears upon the face of the act that they may not be beneficial owners of this property. It is vested absolutely in the corporation like any other of their estates, and not subject to any other control; they have the sole management and disposition of it. And though the act is stated to have been passed for the purpose of enabling them more effectually to complete the navigation of the river, yet *non constat* that they will not derive great private advantages therefrom; and they are enabled by the same act to raise very considerable annual sums by way of toll. With respect to the requisition of the act that an account of the tolls and duties be annually laid before parliament, it can by no means be inferred from thence that the money raised is to be under the control of parliament; nor can the Legislature be considered as having so intended, there being no direction to lay before them an account of the disbursements. If property were necessarily exempted from the poor's-rates because it is vested in a public body for public purposes, the objection would have prevailed in the case of *The King v. The Dock Company of Hull* (a); and in *R. v. Rebowe* (b); but it was never thought tenable by those who argued against those rates. And in *R. v. Cardington*, the grantee of the *Ouze* navigation was held rateable for tolls arising from a sluice, though it was stated that the river had been made navigable for the *public benefit* at a great expence, and was still attended with considerable charges. The defendants therefore are not only such occupiers as are capable of being rated in point of law, but must be considered as occupiers

(a) *Ante* 1 vol. 219.(c) *Bott.* 384.(c) *Corrup.* 581.

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in fact, of the property rated; for *Spencer* is only the lessee of the *herbage and pasture*, the *soil* of the towing paths is still in the possession of the corporation; and it is in respect of that that the defendants are rated. Then 2dly, there can be no doubt on the authority of adjudged cases but that the subject matter, namely, the *barge-way* and *toll-gate*, is rateable. The tolls, which become due in respect of the use made of the land as a towing-path, are as much an adventitious profit arising from the *land* as the mineral water was in the case of the *Cheltenham Spa* (a): and there the occupier was held liable to be rated for the whole amount of the annual profits, although the greatest part of them, in the proportion of four to one, arose from the spring. So in *R. v. Cardington* (b) the grantee of the *Ouze Navigation* was held rateable for the tolls arising from a sluice erected in the parish of *Cardington*, as an adventitious profit arising from the land. And again the case of the *Aire and Calder Navigation* (c) stands upon the same principle. 3dly, It remains only to be considered whether the defendants be rateable for any part of this property within the hamlet of *Hampton Wick*; for if any part of the tolls appear to become due there, this Court will not examine into the quantum of the rate. Now though the tolls be not actually *collected* in this hamlet, yet that makes no difference if any part of them *become due within it*. That is the only criterion: as to which the case of *R. v. Cardington*, and what is said by *Buller, J.* in the *Aire and Calder Navigation* case, are decisive. In the former the tolls were held rateable in the parish of *Cardington*, although they were not collected there, because the *sluice, in respect of which the tolls were payable*, was *locally situated within the parish*. And in the latter case Mr. Justice *Buller* said the material question to consider was *at what place the toll became due*. Here it is apparent upon the face of the act that some of the tolls become due at *Hampton Wick*, and it is found as a fact in the case that some vessels stop and unload there.

Mingay, The Common Serjeant (d), and *Knowles, contra*, contended, 1st, that the defendants were not rateable at all for this property. 2dly, that they were not rateable in *Hampton Wick*. 1st, It appears that the defendants are mere trustees for the *public*; they receive no profits themselves, and therefore are not rateable. The act itself only enables them to make these purchases "for the purpose of more effectually completing the navigation of the *Thames*;" and they are bound to apply the

(a) *R. v. Miller, Cowp.* 619.(b) *Cowp.* 581.(c) *Ante*, 2 vol. 660.(d) Mr. *Sylvester*.

whole profits (be they more or less) to that purpose only. The whole scope of the act shews that the defendants were invested with the right of levying the tolls merely for the great public benefit arising from the improvement of the navigation; they are considered by the Legislature merely as public trustees, and in that character only could they be required to lay before parliament the amount of the tolls collected. This case therefore is very distinguishable from that of the Dock Company of *Hull*; for there the shares were in the hands of *private individuals*; they were profitable, and as much the object of sale as any other species of property. The same answer applies to all the other cases cited. Whereas here the tolls are expressly appropriated by the act of parliament to a specific *public object*, in which the country at large are interested. And so far from being profitable, it appears that the tolls are not sufficient to defray the charges, and therefore the corporation are empowered to borrow money upon them. But 2dly, If the tolls be rateable any where, they are rateable at *Strand on the Green where they are collected*; otherwise the defendants may be rated for the same tolls in each of the several districts through which the river passes, for it will be impossible to ascertain the exact proportion which becomes due in each. The toll is not payable for any specific property, as in the *Cardington* case, but for the benefit of navigating up the stream; for it is ascertained in proportion to the distance from *London*. In the case of the *Aire and Calder* Navigation, where the navigation was carried through several districts, the tolls were held liable to be rated in the place where they were collected. Now here it is particularly stated that no part of the tolls are collected in *Hampton Wick*.

Lord KENYON, Ch. J. From the time when I first read this case to the present moment, I confess I have had no doubt on this question. It appears that some years ago Sir *W. Dolben* was seized of a close called *The Barge-way*, and from persons who passed over it he received tolls: it afterwards became necessary for the city of *London*, as conservators of the river *Thames*, to get possession of this barge-way, lying in *Hampton Wick*; and accordingly they acquired the ownership and possession of this land by virtue of the act of parliament, 17 *Geo. 3. c. 18*. It seems to me that the difficulty which has been made has arisen from not considering *what* is rated; it is not a rate on the tolls, but the close of land, called *The Barge-way* and *The Toll-gate*. Now the questions are, first, whether this property be or be

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not rateable; and, 2dly, who should be rated for it. First, the subject matter of the land is real property; it is land, tenement, or hereditament; and it is liable to be rated, unless it be so circumstanced that there is no occupier on whom the rate can be imposed; as in *Lord Amberst v. Lord Sommers* (a), the case of *St. Luke's Hospital* (b), &c. But here the city of *London* are the occupiers; for the case expressly states that *Spencer's* interest is confined to the herbage and pasture; and therefore, if any injury were done to the soil, the defendants might maintain trespass for it. Where there is no actual possession in another person, the possession follows the property. It is not necessary that there should be a manual occupation every day; as in the instance of the waste of a manor, for injuries done to which the lord of the manor may bring trespass. And in this case there is no doubt but that the city of *London* are in the actual occupation of this property, for persons navigating on the river pay them for the right of passing along the towing path. It is not necessary for us to say how much the city should be taxed in one parish, and how much in another; it is sufficient for us to say that they have the inheritance and ownership of the soil, which is the subject matter of the rate: if they be rated too much, their remedy is by appeal to the sessions.

(c) BULLER, J. after observing that the thing rated was the barge-way and toll-gate, said, that there were two questions; the one, whether the thing rated be or be not in its nature liable to be rated to the poor; the other, whether it be exempted on account of the use to which it is applied. With respect to the former; it is an interest in the soil, lying in *Hampton Wick*, in respect of which they take tolls, some of them payable in that district, and some in other parts. It is not necessary for us to determine whether they be liable to be called on in this district for a proportion of the tolls arising on one entire voyage from *London* to *Staines*; it is sufficient, for the decision of this case, that some of the tolls are due for navigating to *Hampton Wick*. If tolls were to be divided for the purpose of rating them in different parishes, it would create great confusion: but it has been settled in a variety of cases, particularly in *R. v. The Aire and Calder Navigation*, and *R. v. Cardington*, that the party is to be rated for tolls where they become due. The Court, in deciding those cases, proceeded on the principle that the owners were not entitled to receive the tolls till the vessels arrived at a

(a) *Ante* 2 vol. 372.(b) 2 *Burr.* 1053.(c) *Abbot v. Ashburst*, J.

certain

certain place; and where those *tolls are due*, there the party is rateable. It is immaterial in what place they *are received*; for if, in this case, the defendants received them at *Guildhall*, they could not be rated for them in *London*, but at *Hampton Wick*, where they become due. As to the other question; the defendants are in possession of this property, and are therefore *prima facie* liable to be rated for it; if they be entitled to any exemption, it is incumbent on them to shew it. Now it has been objected that they are not liable to this rate, because they hold it on a *public trust*: but, in the first place, it does not appear to be the case of a trust at all; and, if it did, perhaps the consequence contended for would not necessarily follow. Before this act of parliament passed, the defendants were the conservators of the river *Thames*: now we are not sufficiently informed by this case whether they were or were not under any obligation to cleanse and repair the river; and if they were, this act was passed in ease of their burden: but whether they were or not is perfectly immaterial, for they are found in possession of this property which is rateable, and it is not stated negatively that they are not the *beneficial* owners of it.

GROSE, J. The question before us is not whether or not the city of *London* be rated too high, but whether they be properly rated for that which is the subject of the rate. Now the rate is on the barge-way and toll-gate; and it appears from the case that the soil is in the defendants, and not leased out, as it was in *R. v. Jolliffe(a)*: The soil therefore remaining in them, they are properly assessed for it. Then is the city of *London* rateable in this district; it is stated in the case that 2*d.* *per ton* is due for goods landed at *Hampton Wick*; something therefore is rateable to the poor in this place; and if we were to determine that the defendants are not liable for that in *Hampton Wick*, we should in effect overturn the case of *R. v. Cardington*. The remaining question is whether the city of *London* be trustees of this property for the benefit of the Public: on this I confess I had some doubt at first, but the manner in which my brother *Buller* has put this question removes all difficulty; for, finding the defendants in possession of some property, and that property rateable, they should have shewn that they were trustees for the Public: but not having done so, they must be rated for it.

Order of sessions confirmed.

(a) *Ante*, 2 vol. 90.

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The KING
against
The Mayor,
&c. of,
LONDON.

1790.

Thursday,
Nov. 18th.

In an action by the indorsee against the acceptor of a bill of exchange, drawn payable to "A. or order," it is competent to the defendant to give evidence that the person, who indorsed to the plaintiff, was not the real payee, though he be of the same name, and though there be no addition to the name of the payee on the bill.

If a bill of exchange, payable to A. or order, get into the hands of another person of the same name as the payee, and such person, knowing that he was not the real person in whose favor it was drawn, indorse it, he is guilty of a forgery.

MEAD *against* YOUNG.

THIS was an action brought by the indorsee of a bill of exchange for 90*l.* against the acceptor. The bill was drawn at *Dunkirk* by *Christian* on the defendant in *London*, payable "to *Henry Davis*, or order;" and, having been put into the foreign mail, enclosed in a letter from *Christian*, it got into the hands of another *Henry Davis* than the one in whose favor it was drawn. The defendant accepted the bill; and when *Davis* desired the plaintiff to discount it, the latter made application to the defendant to know whether or not it was his acceptance; and, on receiving an answer in the affirmative, coupled with an assurance that it was a good bill, he discounted it, not knowing the *H. Davis* from whom he took it. There was no ground to impute any fraud to the plaintiff. On the trial before Lord *Kenyon*, after the plaintiff had proved the defendant's hand writing, and the indorsement by *Davis*, the defendant offered evidence to shew that the *H. Davis*, who indorsed to the plaintiff, was not the real *H. Davis* in whose favor the bill was drawn: but Lord *Kenyon* being of opinion that such evidence was inadmissible, the plaintiff recovered a verdict. A rule having been obtained to shew cause why a new trial should not be granted on this misdirection;

Erskine, and *Shepherd*, now shewed cause. If there had been any particular description of the payee on the bill, the plaintiff must have taken care that the person from whom he received it answered the whole of the description: but there was no description of, or addition to, the *H. Davis*; there was nothing on the bill to lead either the acceptor or any third person to suspect that the *H. Davis*, who was in possession of the bill, was not the real payee. And, so far from the plaintiff's having incurred any charge of neglect, he seems to have taken more than ordinary caution in making enquiries of the acceptor before he discounted the bill. There is no pretence to impute either fraud or neglect to the plaintiff; he stands in the situation of an innocent purchaser for a valuable consideration. This case therefore falls within the common rule, that, where one of two innocent persons must suffer by the fraud of another, the loss must be borne by him who enabled the party to commit the fraud; and in this case that person is *Christian*, who ought to have described the payee more particularly.

Piggott, Mingay, Law, and Baldwin, in support of the rule. A party, purchasing a bill of exchange, is, like the purchaser of any other species of property, bound to enquire into the title of him from whom he buys. No person can derive title to this bill but he who claims under the real *H. Davis*: and it is indifferent whether the person indorsing the bill be or be not of the same name with the real payee; in neither case can any property be transferred but by him who has the title. If he bear the same name, *prima facie* indeed he may be presumed to be the same person, till the contrary be shewn: but here the question was, whether evidence should not have been received to prove the contrary. If such evidence be not admissible, it will follow that payment to a person of the same name with a legatee would discharge the executor, or a payment by a debtor to any person who had the same name as his creditor: but that cannot be pretended. This bill was drawn in order to satisfy a debt due from *Christian* to the real *H. Davis*; and yet payment of this bill to the plaintiff can never be considered as a discharge of that debt, without the indorsement of that *H. Davis*. In all cases where a bill is drawn payable to *A. B. or order*, it is indispensibly necessary to prove the hand-writing of the payee, which was not in fact done in this instance. The necessity of this proof is apparent from the form of the declaration; which, after alleging that the bill was drawn in favor of *H. Davis*, avers that *the said H. Davis* afterwards indorsed to the plaintiff. If the negligence of either of the parties be resorted to as a ground for the determination of this case, the plaintiff seems to have been guilty of the greatest negligence in taking a bill from a person whom he did not know: whereas the transaction, as far as *Christian* was concerned, was carried on in the ordinary course of business. There is also another objection to the plaintiff's recovering, because he claims through a forgery: For the *H. Davis*, who received the bill inclosed in a letter from *Christian*, must have known that it was not intended for him; and the circumstance of his bearing the same name with the payee would be no defence to him on a prosecution for forgery, since he put a false signature to an instrument with intent to defraud.

Lord KENYON, Ch. J. The question here is, whether the name of *H. Davis*, to whom the bill on the face of it was payable, shall or shall not convey a title to this plaintiff who gave a valuable consideration for it, and who discounted it with the name of *H. Davis* upon it, and with an assurance from the defendant

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that it was accepted by him. If any fraud, or even neglect, could be imputed to the plaintiff, that would vary the case: but, circumstanced as these parties were, I think that, if the plaintiff cannot recover, it will put an insuperable clog on this species of property. I cannot distinguish this case on principle from that of *Miller v. Race* (a), where the innocent holder of a note, which had been taken when the mail was robbed, was held entitled to recover; that indeed was a note payable *to bearer*, but still the same principle must govern both cases. In this case the fault originated with the drawer of the bill, in not describing more particularly the person to whom he intended it should be paid. The plaintiff was not bound to send to *Dunkirk* to know whether the person, who had possession of the bill, was or was not the real *H. Davis*. There may indeed be some inconvenience the other way; but setting the inconvenience on the one side against that on the other, in my apprehension it would throw too great a burthen on persons taking bills of exchange to require proof of an indorsee that the person from whom he received the bill was the real payee. Such proof has never yet been required of an indorsee in such an action: and therefore I think that, as there was no fraud, or want of due diligence on the part of the plaintiff, he is entitled to recover; however I give this opinion with some diffidence, as my brothers have intimated that they are of a different opinion.

ASSHURST, J. This is a case of considerable importance; and I think that we ought to grant a new trial, that the parties may have an opportunity of putting the question on the record. The present inclination of my opinion is with the defendant. In order to derive a legal title to a bill of exchange, it is necessary to prove the hand-writing of the payee; and therefore though the bill may come by mistake into the hands of another person, though of the same name with the payee, yet his endorsement will not confer a title. Such an indorsement, if made with the knowledge that he is not the person to whom the bill was made payable, is in my opinion a forgery; and no title can be derived through the medium of a fraud or forgery. This is distinguishable from the case of *Miller v. Race*; for there the note was payable *to bearer*: In such cases the bearer, who purchases for a valuable consideration, and without notice of any fraud, is entitled to receive the contents of the bill; and payment to him is a discharge to the drawer. But in this case the bill was drawn payable to *H. Davis, on order*; and though the name of *H. Davis*

(a) 1 Burr. 452.

were indorsed on the bill, yet it was incumbent on the plaintiff, who claims through the payee, to be satisfied that that was the indorsement of the real payee.

BULLER, J. As the bill in this case is of great value, the parties may put this question in a mode to be decided by the *demier resort*. As at present advised, I entertain the same opinion as my brother *Ashburst*. If we were to enquire whether any laches were to be imputed to the plaintiff or the drawer, I rather think the plaintiff is more in fault than any other person, in advancing his money to *H. Davis*, who was a total stranger to him. But, without going into any such enquiry, I am of opinion that it is incumbent on a plaintiff, who sues on a bill of exchange, to prove the indorsement of the person to whom it is really payable: The general form of the declaration shews that it is so; for that is that "the said *A. B.* to whom, or to whose order, the payment of the said sum of money mentioned in the said bill was to be made, afterwards &c, indorsed the said bill, his own proper hand writing being thereto subscribed." Now here it is clear that the indorsement was not made by the same *H. Davis* to whom the bill was made payable; and no indorsement by any other person will give any title whatever. Then, is there any thing in this case that estops the defendant from saying that the person who indorsed to him was not the real payee? Now the act of that person who indorsed, and who in so doing was guilty of a forgery, cannot prevent an innocent person from shewing the truth. Then it was argued that *Christian* was guilty of negligence, in not describing more particularly the payee; but I know of no authority which requires that to be done. This bill was drawn in the common form, payable "to *H. Davis* or order;" and the drawer could not foresee that it would get into the possession of any other *H. Davis*. If any other stranger had received this bill, and indorsed it over to the plaintiff, it is not pretended that such indorsement would have conveyed any title to the bill; and it cannot make any difference whether such stranger bear the same name with the real payee or not; for no person can give title to a bill but he to whom it is made payable. Independently of these reasons, I think that convenience requires that the determination should be in favor of the defendant. I have no difficulty in saying that this *H. Davis*, knowing that the bill was not intended for him, was guilty of a forgery; for the circumstance of his bearing the *same name* with the payee cannot vary this case, since he was not the *same person*. Then if the plaintiff

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against

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plaintiff cannot recover on this bill, he will be induced to prosecute the forger; and that would be the case even if it had passed through several hands, because each indorser would trace it up to the person from whom he received it, and at last it would come to him who had been guilty of the forgery: whereas if the plaintiff succeed in this action, he will have no inducement to prosecute for the forgery; the drawer, on whom the loss would in that case fall, might have no means of discovering the person who committed the forgery, and thus he would probably escape punishment. As far, therefore, as convenience can have any effect, it weighs strongly with me to receive the evidence. But at all events the plaintiff cannot recover, since he derives his title under a forgery.

GROSE, J. I am of opinion that it was competent to the defendant to shew in evidence that the person, who indorsed to the plaintiff, was not the person named as the payee in this bill of exchange; and I form that opinion as well on the substance of the transaction as on the form of pleading in such cases. A bill of exchange is only a transfer of *a-chose in action* according to the custom of merchants; it is an authority to one person to pay to another the sum which is due to the first, and it is generally directed to be paid to the payee or his order. When the person, on whom it is drawn, accepts, he only engages by the terms of his acceptance to pay the contents of the bill to the person named in it, or to his order. The general form of the declaration which is to be found in some of the old entries also agrees with this doctrine, and points out what the law is: I observe indeed that this declaration is not drawn in the usual form, for the words "to whom or to whose order" are omitted; but still it is that the *said H. Davis*, that is the same *H. Davis* who is mentioned in a former part of the declaration as the payee, indorsed to the plaintiff. It clearly therefore appears that as no person can demand payment of a bill of exchange but the payee, or the person authorized by him, the acceptor only undertakes to pay to them, and cannot be compelled to pay to any other person. If he pay the amount of the bill to any other person, he pays it in his own wrong, and such payment does not discharge his debt to the drawer. If this decision will prove a clog on the circulation of bills of exchange, I think it will be less detrimental to the Public, than permitting persons to recover through the medium of a forgery. And that this was a forgery cannot be doubted, if we consider the definition of it; which is, the false making of any instrument, indorsement &c, with in-

tent to defraud (a). It makes no difference whether the person making this false indorsement were or were not of the same name with the payee, since he added the signature of *H. Davis*, with a view to defraud, and knowing that he was not the person for whom the bill was intended. I agree also with my brother *Buller*, that this decision will be more convenient to the Public; because then the plaintiff will prosecute the person, who indorsed to him, for the forgery. For these reasons I am of opinion that, as this bill of exchange was only payable to the payee or his order, it was competent to the defendant, the acceptor, to enquire whether the person under whom the plaintiff claims were or were not the payee.

Per Curiam,

Rule absolute.

(a) *Vid. 2 Geo. 2. c. 25. s. 1.*

1790.

MEAD
against
YOUNG.

ROSS against HUNTER.

Thursday,
Nov. 18th.

THIS was an action against an under-writer upon a policy of insurance on goods on board the *Live Oak*, whereof was master *Joseph Rati*, at and from *Jamaica* to *New Orleans*. The first count of the declaration, which was in the usual form, contained an averment that the ship "before her arrival at *New Orleans* was, together with the goods &c, by the *barratry* of the said *Joseph Rati*, he then and there being master of the said ship &c, run away with and wholly lost to the plaintiff &c."

There was a second count in the declaration as upon a loss by the perils of the sea.

It appeared at the trial that the *Live Oak* was put up by *Rati*, who acted as master, as a general ship, at *Kingston* in *Jamaica* in 1783, and that the plaintiff, amongst other persons, shipped the goods in question, which were flour and other dry goods on board her. She sailed on the voyage insured in May 1783, and arrived in June following at the mouth of the river *Mississippi*, which leads up to *New Orleans* in *Spanish America*, at the distance of about 35 leagues. When the captain had got thus far he dropped anchor; and went in his boat up the river to *New Orleans*, and on his return, without carrying the ship to her port of destination, stood away for the *Havannab*; after his de-

In an action by the assured of goods against the under-writers for a loss by the *barratry* of the master, proof that the person who was described in the policy as master, and who was treated with and acted as such, carried the ship out of her course for fraudulent purposes of his own, *prima facie*, is sufficient to entitle the plaintiff to recover, without shewing negatively that he was not the owner, or that any other person was. Such

proof lies on the defendant, wishing to avail himself of it, to establish. And where the voyage insured was from *Jamaica* to *New Orleans*, which lies up the river *Mississippi*, and the captain proceeded on his voyage as far as the mouth of that river, and then dropped anchor, and went up the river in his boat for a fraudulent purpose of his own, held that the dropping of his anchor with such fraudulent intent was an act of *barratry*, and not merely a deviation.

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parture from whence he was never afterwards heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reasonable evidence for supposing he intended to have disposed of at *New Orleans*, but finding it difficult to do so on account of an interdiction against the importation of them by the *Spanish* government, he went to the *Havannah* in quest of a market for them. Several letters were agreed to be received in evidence which passed between the plaintiff and his correspondents, from whence it appeared that they had made every enquiry concerning *Rati*, but without success: and there was ground for believing that the vessel was afterwards lost. In these letters he was mentioned as the *master* of the vessel, and treated as one who had run away with the cargo; but whether he, or what other person, were *owner* of the ship did not appear. The defendant offered no evidence, but contended that upon the plaintiff's own shewing he could not recover; for, as to the second count, the under-writer was discharged, there having been a clear deviation proved from the voyage insured, which was admitted. And as to the first count, there was no evidence of the captain's having been guilty of *barratry*; for *non constat* that he was not *owner* or *general freighter* of the ship himself, or, if he were not, that he had acted contrary to the directions of the owner in going out of his original course; in either of which events he could not be guilty of *barratry*. But, admitting the evidence to be sufficient for that purpose, it was contended that there had been a previous deviation before the *barratrous* intention took effect. But Lord *Kenyon* being of opinion that the plaintiff was entitled to recover on the first count, the jury found accordingly. And now upon motion to set aside the verdict and grant a new trial on the above facts,

Mingay, and *Lambe*, shewed cause against the rule; contending, first, that the proof offered by the plaintiff was *prima facie* evidence of *barratry*; for they proved that the person, who bore the character of captain, having put some negroes of his own on board, which he could not dispose of at the place of his original destination, had fraudulently for his own purposes run away with the ship and cargo. The circumstance of clandestinely going up the river in his boat was strong evidence of the fraud. And therefore as the character of captain by no means implied that of owner, but was used rather in contradistinction to it, it was incumbent on the defendant who wished to avail him-

self of that particular fact to prove in his defence that the captain was also owner, or had chartered the ship generally: otherwise it would be calling on the plaintiff to prove a negative, which is contrary to the usual rule of evidence. Secondly, it was a question of fact for the jury to decide at what time the *barratrous* intention commenced, which they have done by their verdict: and indeed there is no pretence for considering the deviation and the *barratry* as two distinct acts; for as the deviation, at whatever time it began, was clearly founded on the fraudulent and *barratrous* intention of the master, the particular period of its commencement was immaterial for the first desertion of the voyage insured was the inception of the *barratrous* intent.

Erskine, Law, and Gregg, in support of the rule, insisted on the grounds on which the motion had been founded. 1st. The plaintiff, having by his declaration averred the loss to have happened by the *barratry* of the master, had taken upon himself to make out that proposition in *toto*. Now *barratry* is a complex term, signifying any species of fraud committed by the master or mariners *against the owner of the ship*. It was so held in *Vallejo v. Wheeler* (a), and in *Nutt v. Bourdieu* (b). From thence it appears to be an essential ingredient in the constitution of *barratry* that the act be in fraud and against the consent of the *owner of the ship*. Therefore it was incumbent on the plaintiff seeking his remedy against the under-writer, upon the ground of the *barratrous act* of the captain, not only to shew that the captain and the owner were different persons, but also that the act complained of, such as the deviation in the present case, was committed against the will and in fraud of such owner; otherwise the charge of *barratry* in the captain cannot be substantiated. For if the deviation appear to have been made by one who is the owner or freighter himself, or by the direction of such owner or freighter, then the insurer is discharged, and the remedy of the insured is against the owner. If this were otherwise, it would only be necessary upon a declaration, as for *barratry* in the captain's running away with the ship and goods, to prove a simple deviation, which *prima facie* imports the discharge of the under-writer, and is often set up as his defence: and the burthen of proof that it had been directed by the owner would be thrown upon the underwriter, who cannot in the nature of things be supposed to be so well acquainted with the owner of the ship as the insured who has

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(a) *Cowp.* 143.(b) *Ante*, 1 vol. 323.

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before trusted his goods on board. This may be compared to the case of burglary; on an indictment for which it is not merely necessary to prove that the party broke and entered *an house*, but it must be shewn *whose* house; for otherwise, *non constat* but it might be the house of the party himself. Here the circumstance of the ship being put up as a *general* one in a foreign port rather implies that *Rati* was the general freighter at least, if not the owner, of her. And the case of *Vallejo v. Wheeler* shews that such a person is to be considered as owner *pro hac vice*. Nor is it likely, unless he stood in one or other of those characters, that he would have incumbered himself with such an adventure as negroes, which were so foreign to the avowed purpose of his voyage, and could not have escaped detection. Secondly, at all events there was a deviation in this case before the barratrous intent commenced, which is sufficient to discharge the under-writer; for either the captain never intended to go to *New Orleans* at all, in which case, by a variety of authorities, there was no inception of the voyage insured, though he navigated for some time in the same tract: or he did not quit the intention of going there till after he had returned in his boat from *New Orleans*, and had found that he could not land his cargo of negroes. In the latter case he was guilty of a deviation, before the barratrous intent commenced, in putting the ship the smallest degree out of her course, which he must necessarily have done in bringing her to an anchor previous to his going up the river in his boat; for that was entirely beside the purpose of the voyage insured, and was a wilful dereliction of the voyage for a time; and there can be no distinction between a greater and a less deviation.

Lord KENYON, Ch. J. The conclusion which the jury have drawn by their verdict is that this was barratry, and the question now is whether the evidence be sufficient to support that conclusion. The first point to be considered is whether *Rati* can be taken to be the *owner* of the ship. Now as to that he was clearly proved to be the *captain*; but there was no proof whatever of his being *owner*. And if that fact were necessary to constitute the defence of the underwriter, the affirmative proof lay upon him. If we were to infer any thing, it would be the contrary; for *Rati* acted as *captain*; the letters speak of him as having been once before *consigned* to the house of *Taylor* and *Montford*; He is therein treated as a criminal who had run away with the ship and cargo. It is sufficient however

ever to say that there was no proof of his being owner. Then the next question which arises is, whether the ship going out of her course is to be attributed to deviation or barratry? Upon this head the question was well put at the bar, when did the barratry commence? It commenced when he first went out of the due course of his voyage in violation of his duty; and the verdict of the jury was founded upon that ground.

ASHHURST, J. The question is, whether the plaintiff's evidence were sufficient to be left to the jury as to the barratry of the master? As to which the fact stands simply thus; the ship in question was put up as a general ship, of which *Rati* was stated to be the *master*; that *prima facie* then supposes him not to be the *owner*. Then the rule of evidence applies in this case, that the affirmative is always to be proved by those whose interest it is to prove it. Here it was the plaintiff's interest to prove that *Rati* was the *master*, which he did accordingly; if then it were for the defendant's interest to prove that he was also *owner*, it was incumbent on him to shew it: but there being no evidence of that sort, the jury did right in finding him guilty of barratry on the facts which were in evidence before them.

BULLER, J. Barratry is a question of law which, like other questions of law, arises out of facts, and has been well settled. In one sense of the word it is a deviation by the captain *for fraudulent purposes of his own*; and that is the distinction between *deviation*, as it is generally used, and *barratry*. Then the question is, whether the captain in this case deviated *with a fraudulent view*, so as to constitute *barratry* upon the evidence given in the cause. That will depend upon two questions; First, what it is necessary for a plaintiff to prove upon a declaration for the barratry of the captain; and Secondly, what evidence there was in this case of fraud in the captain. First, It appeared that the ship had been put up as a *general ship*, ready to take the goods of any person to the port to which she professed to be destined; the owner of goods therefore may in such a case be supposed, in general, to be an entire stranger to the ship; he deals with the captain *quà captain*; he knows him in no other character; he acts under the information of the advertisement which is usually put forth on those occasions, wherein *Rati* was in the present instance described to be *master*. By the terms too of the policy the underwriter contracted to indemnify the plaintiff against the barratry of this very man. In case then of

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a loss, what is incumbent on the plaintiff to prove? He must prove the subscription of the underwriter, his own interest in the goods, his shipping them on board the vessel, described in the policy, and the loss of them in consequence of such an act by the captain as amounts to barratry, that is, that he went out of the course of his voyage *for a fraudulent purpose*. It was not incumbent on the plaintiff to prove that the captain was not the owner, for that would be calling on him to prove a negative; and if the captain were not the owner, it is immaterial who was. Proof of that fact, which operates in discharge of the other party, lies upon him. I agree that, if the captain had freighted the ship for the voyage, he could not be guilty of barratry; but the proof of such fact lies equally on the defendant. It is then asked, why it should not be presumed that the captain went out of his course by the directions of his owner, if he had any? The reason is plain; because the Court cannot presume fraud in another person. The case put of an indictment for burglary does not answer the purpose for which it was cited. For suppose the goods were not actually taken and carried away, observe what would be sufficient to be proved; the fact of breaking and entering the house; and whose house it was; and that it was in the night; because all these circumstances are specifically alleged in the indictment, and they are all affirmatives; then the intent with which these facts were done is equally material: but if the prosecutor prove all the former circumstances, it is a question for the jury to determine whether he did not enter with the view of stealing the goods, unless the party accused can shew to their satisfaction that his intent was innocent. That brings me to the next question, which in my opinion is the most material one here, namely, what was the view of the master when he sunk his anchor at the mouth of the river *Mississippi*; for if it were done with a fraudulent view, I hold that the very sinking of his anchor was an act of barratry. His intent in so doing was a question for the jury, and they have found by their verdict that it was with the barratrous intention charged. It appears that he had some negroes on board belonging to himself, which he wished to have disposed of at *New Orleans*, but finding upon going up thither in his boat that he should not be able to do so, he returned back again to his ship, and immediately sailed for another port. Then is it too much to say that he went to *New Orleans* for the purpose of his own private advantage,

and

and that the stopping the course of his ship was for a fraudulent purpose? Does it not prove clearly that when he dropped his anchor he did not intend going to *New Orleans*, unless it suited his own private advantage? The evidence too to be collected from the letters shews that he was considered as a thief and criminal, and pursued as such; and that all the persons concerned treated him in the character of *master* only.

GROSE, J. of the same opinion.

Rule discharged.

DOE on the Demise of WILLIS and Others *against*
MARTIN and Others.

Friday,
Nov. 19th.

THIS was an ejectment for some premises in the *Isle of Wight* on the joint and several demises of *Richard Legg Willis*, *James Willis*, *Bethia Ann Willis*, and *Mary Willis*. And on the trial at the Summer Assizes at *Winchester* 1789, before *Buller J.* a special verdict was found, stating in substance, as follows;

That *Bethia Legg*, being seised in fee of the premises in question, on her intended marriage with *Richard Willis*, by deeds of lease and release, dated the 14th and 15th of *February* 1757, between *Richard Willis* of the first part, *Bethia Legg* of the second part, and *Peter Bracebridge* and *Robert Willis* of the third part, conveyed to *Bracebridge* and *Robert Willis* and their heirs to the use of herself in fee till marriage, and afterwards, to her sole and separate use for life, without impeachment of waste, and not to be subject to the control or debts of her husband; remainder to the use of *Richard Willis* for life, without impeachment of waste; remainder to the use of all and every the child or children or such of them of *Richard Willis* and *Bethia* for such estates and interest &c, and in such parts, shares, and proportions as *Richard Willis* and *Bethia* should by deed appoint,

more than one, as tenants in common, and if but one, then to such only child, his, or her, heirs or assigns for ever; remainder over: in the deed was contained a power enabling the settlors to revoke the uses of the settlement, and the trustees to sell the estate, and convey it to a purchaser, so as the purchase-money should be paid to the trustees (and not the settlors) and invested in the purchase of other lands to the same uses; it was held that the remainder to the children was a vested remainder in fee, liable however to be divested by an appointment by the parents; and consequently (no appointment having been made) that the remainder to the children could not be defeated by a deed of revocation by the parents and a conveyance by them and the trustees to a purchaser, who paid the consideration-money to the settlors (not to the trustees) which was never laid out in the purchase of any other lands.—That power of revocation was conditional; and as the conditions, namely, the payment of the money to the trustees, and the settling of other estates to the same uses, were not performed, the deed of revocation was a nullity.—Fraud will vitiate any transaction, though the principal do not personally take any part in the fraud, if his agent do; for the principal is civilly responsible for the acts of his agent.

By a marriage settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates &c. as the husband and wife should appoint, and for want of such appointment, to the use of all and every the child or children, equally, if

and

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against
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Bethia Legg Willis
14. & 15. Feb. 1757.
settled by deed between
Richard Willis of the first part,
Bethia Legg of the second part,
and Peter Bracebridge and Robert Willis of the third part,
conveyed to Bracebridge and Robert Willis and their heirs to the use of herself in fee till marriage, and afterwards, to her sole and separate use for life, without impeachment of waste, and not to be subject to the control or debts of her husband; remainder to the use of Richard Willis for life, without impeachment of waste; remainder to the use of all and every the child or children or such of them of Richard Willis and Bethia for such estates and interest &c, and in such parts, shares, and proportions as Richard Willis and Bethia should by deed appoint,

1790.

DOE
against
MARTIN.

*Power to re-
voke & sell in
order to purchase
other estates to be
settled to same
uses.*

and for want of such appointment, then to the use of the child or children of *Richard Willis* and *Bethia* in such parts shares and proportions, and for such estates and interest, as the survivor of them should by deed or will appoint, *and for want of such appointment then to the use of all and every the child, or children, equally, share and share alike*, to hold the same, if more than one, as tenants in common, and not as joint-tenants, and if but one child then to such only child, his, or her, heirs or assigns for ever; and in default of such issue, then to the use of the survivor of *Richard Willis* and *Bethia*, in fee. The deed contained the following proviso; That, in case the said *Richard Willis* and *Bethia* his intended wife, or the survivor of them, should at any time thereafter be desirous to make sale of the said manor &c, or any part thereof, then and in such case it should and might be lawful to and for the said *Richard Willis*, and *Bethia* his intended wife, or the survivor of them, at any time or times thereafter, by any writing or writings to be signed or sealed by the said *Richard Willis* and *Bethia* his intended wife, or the survivor of them, *to revoke and make void all and every, or any, the use and uses, trust or trusts, estate or estates, therein respectively before limited, and declared of and concerning the said manor &c, with the appurtenances; and for the said Philip Bracebridge and Robert Willis, or the survivor of them, his heirs or assigns, to sell and dispose of the same, for the best price that could or might be had or gotten for the same, and convey the same to a purchaser thereof, so as that the purchase money thereof should be paid into the hands of the said Philip Bracebridge and Robert Willis, or the survivor of them, his heirs and assigns, and not into the hands of the said Richard Willis and Bethia his intended wife, or either of them, to be laid out and invested by the said Philip Bracebridge and Robert Willis, or the survivor of them, his heirs or assigns, in the purchase of other freehold messuages, lands &c, at the request of the said Richard Willis and Bethia his intended wife, or the survivor of them, to be settled to the same uses, trusts, intents, and purposes, as were therein before limited &c.* It was also provided that the trustees might invest the purchase-money in government or other securities in their names, and pay over the dividends to the persons who would have been entitled to the profits of the real estates. And for the security of the purchaser of the estate, it was agreed that the payment of the purchase-money unto the trustees &c, should discharge such purchaser, notwithstanding any loss or mis-application,

application that might happen to such purchase-money. The verdict then set forth that on the 3d March 1757 the marriage between *Richard Willis* and *Bethia Legg* took effect; and that they had several children (to wit) *Richard Legg Willis*, their eldest son and heir, *James Willis*, *Bethia Ann Willis*, and *Mary Willis*, the lessors of the plaintiff; and also one *Thomas Willis*, since deceased. That *Robert Willis* survived *Philip Bracebridge*, his co-trustee, and by will appointed *Mary Willis* his widow, and *Richard Willis*, his brother, executor and executrix thereof, and in January 1765 died leaving *Robert Willis* an infant, his only son and heir at law; which last mentioned *Robert Willis* at the time of executing the indentures of 14th and 15th April 1767 hereafter mentioned was of the age of five years. That on the 17th of September 1766 the first mentioned *Richard Willis*, the lessor's father, being insolvent or much embarrassed in his circumstances, contracted and agreed with *Joseph Martin*, now deceased, for the sale of the said manor, &c, for 7680l; and that before and at the time of making the contract, and from thence and until and at the time of executing the indentures of the 14th and 15th April 1767 hereafter mentioned, *Joseph Cruttenden*, attorney at law, and one of the solicitors of the Court of Chancery, was the general agent of the said *Joseph Martin*, and acted as such agent in the transaction hereafter mentioned. That *Cruttenden* was also the agent of the first mentioned *Richard Willis* (the lessors' father) in this particular transaction. That on the 17th of February 1767 *Cruttenden*, who had previously received, and had in his custody, the marriage settlement of the said *Richard Willis* and *Bethia Willis* his wife, and the title deeds of the said manor &c, presented a petition on behalf of the first mentioned *Richard Willis* and *Bethia* his wife to the Right Honourable *Charles Lord Camden*, then Lord High Chancellor of Great Britain, stating (amongst other things) to the effect herein before mentioned, and that were the said petitioners to exercise the power so given to them of revoking the uses and trusts of the said recited settlement, for the purpose of making a sale of the said manor, &c, so settled as aforesaid, yet as there was no power given to them to limit or declare any new or other use or uses, either to the petitioners, or their heirs, or otherwise, so as to convey a good legal title to a purchaser, the petitioners were advised that, on such revocation being executed, the legal estate would result unto, and become vested in, the said *Robert Willis* the infant, as heir of the surviving trustee, in trust to

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Doe
against
MARTIN.Yme of the
marriage; viz. the
lessors of pl. &c.Robt. Willis born
became a minor & died
- his son, & died
in Jan'y 1765 leav-
ing Robt. Wil-
- lis an infant son
under four years
of age. - Richd.
Willis & Mary the
wife of Robt. Willis
made his executors.That
I have seen the
marriage settlement
of Robt. Willis &
Bethia Willis his
wife, & the title deeds
of the said manor &c
17. Feb'y 1767. &
- petition to Lord Chan-
- cellor Camden to
- under the inf. & heir
- of surviving trustee
- to convey on a sale
- under the power
- to revoke & sell.

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against
MARTIN.

convey the same to a purchaser, pursuant to the power before mentioned; in which case it was apprehended that the said *Robert Willis* the infant would become an infant trustee within the statute of the 7th of *Ann.* (a) intituled "An Act to enable infants who are seised or possessed of estates in fee, in trust, or by way of mortgage, to make conveyance of such estates;" stating also that a doubt had arisen upon the construction of the latter proviso in the settlement, to whom the purchase money should be paid, and by whom laid out, and invested, in the purchase of land to be settled to the uses of the marriage settlement; that the petitioners were desirous that the agreement entered into with *Martin* should be carried into execution; that a good legal conveyance should be made of the manor, &c, unto the said *Martin* and his heirs, discharged from the uses and trusts of the settlement; that the purchase-money should be paid to the executors of the surviving trustee, to be invested according to the trusts of the settlement; and therefore praying that it might be referred to one of the Masters in Chancery, to examine and certify whether the said *Robert Willis* the infant were a trustee within the act; and that upon the Master's Report, such further orders might be made as to the Lord Chancellor should

17 Feb. 1767
Reference to the
Master.

seem meet. The verdict then stated an order of reference dated 17 February 1767 to Mr. Lane, one of the Masters in Chancery, to examine and certify how the said manor, &c, were vested in the said *Robert Willis* the infant, and whether he were an infant trustee within the act; and that *Cruttenden* attended the said Master Lane upon the order of reference as solicitor for the first mentioned *Richard Willis* and *Bethia* his wife, and also as solicitor for *Robert Willis* the infant. The verdict then stated that the Master reported on the 23d of March that *Robert Willis* the son was an infant trustee within the meaning of the act; but no notice was taken in the report of the proviso for revoking the

23 March
Master's Report.

As the petition
in which the
reference was
made stated this
matter, I do not
see the necessity
of its being restated
by the master in
his report.

uses in the settlement, or of the application of the purchase-money, or of any doubt suggested in the petition. Upon the making of this report, *Cruttenden* presented another petition on behalf of *Richard* and *Bethia Willis* to the Lord Chancellor, reciting the order of reference, and the Master's Report, and praying that the Report might be confirmed; and that upon payment by *Martin* of 7680 l. unto the executors of *Robert Willis*, the surviving trustee, to be by them invested according to the trusts of the settlement, *Robert Willis*, the infant, might be directed to

Petit. to have
reference confirmed,
at the same time
by the Master the
purchase-money of
£7680. unto the executors of Rob.
Willis the surviving trustee,
his exors. heirs might convey to
Martin.

(a) 7 An. c. 19.

join

join in a conveyance of the manor, &c, to *Martin*, discharged of the trusts of the settlement. That, previous to the hearing of the petition, *Cruttenden* prepared and delivered a brief to counsel for *Richard* and *Bethia Willis*, and another brief to another counsel for *Mary Willis* and *Richard Willis* the executor and executrix, containing merely a direction for him (if necessary) to consent on their behalf to the prayer of the last petition so far as the same concerned the executors, and another brief to another counsel for *Robert Willis*, the infant, containing merely a direction for him to submit on behalf of *Robert Willis*, the infant, to such order as the Court should make in respect to him on the last petition. That on the hearing of that petition on the 20th of *March* 1767, the Lord Chancellor made an order, whereby, after stating the report, and that counsel for the petitioners and *Robert Willis* the infant had attended on that day, and that the counsel for *Robert Willis*, the infant, did not oppose the prayer of the last petition, the Lord Chancellor ordered that the Master's Report should be confirmed, and that *Robert Willis*, the infant, according to the report should convey the premises pursuant to the act of parliament; which last mentioned order was made by the Lord Chancellor before any revocation of the uses created by the indenture of the 15th of *February* 1757. That on the 31st of *March* 1767 by a certain deed or instrument in writing, prepared by *Cruttenden*, and indorsed on the indenture of the 15th of *February* 1757, and duly executed by the first mentioned *Richard Willis* and *Bethia* his wife, they by virtue and in pursuance of the power and authority in the last mentioned indenture contained, and by force and virtue of all other powers &c, revoked and made void all and every the use or uses, &c, in the last mentioned indenture limited and declared of and concerning the said manor, &c, which by the last mentioned indenture, and the lease for a year thereby referred to, were granted, released, and conveyed by *Bethia Willis* to the several uses, and for the several purposes in the same indenture mentioned, to the intent and purpose that the fee-simple and inheritance thereof might be sold and conveyed according to the true intent and meaning of the last mentioned indenture and of the parties thereto. The verdict then set forth indentures of lease and release dated the 14th and 15th *April* 1767, which were prepared by *Cruttenden*, and made between *Robert Willis*, the infant, of the first part, *Mary Willis*, widow, and *Richard Willis*, executor and executrix of the second part, the first mentioned *Richard Willis* and *Bethia* his

1790.

DOE
against
MARTIN.20th March 1767.
Report confirmed
order that inf.
h^d sh^d convey
accord^g to pet^r.31st March 1767.
Rich^d Willis &
his wife gave the
uses of the settlem^t.14. & 15. April 1767
Convey^d to Martin
the purchaser in
cons^d of his paying
£7600. to the exec^s
of Rich^d Willis & Rob^t Willis the surv.
trustee in the
settlement.

1790.

DOE
against
MARTIN.

*Findings as to
the manner of
the payment, in
consequence of
which the pur-
chase money
was at length
taken & misap-
plied by Richd.
Willis, & father
of the children
intitled under the
settlement.*

*Martin
found not perso-
nally to have
an intention
of defrauding
the children
intitled under
the settlement.*

his wife of the third part, and *Martin* of the fourth part, by which, in consideration of 7680*l.* paid by *Martin* to *Robert Willis*, the infant, and *Richard Willis* and *Mary Willis* the trustees and executors, before named, or to one of them, with the privity and consent, and by the direction, and appointment, of the first mentioned *Richard Willis* and *Bethia* his wife, *Robert Willis* the infant, by virtue of the said act of parliament, and in obedience to the order made in pursuance thereof, with the privity and consent, and by the direction and appointment, of the first mentioned *Richard Willis* and *Bethia* his wife, granted, bargained, sold, and released, and the first mentioned *Richard Willis* and *Bethia* his wife, by virtue of all powers and authorities granted to them, or either of them, implied, reserved, or appertaining, limited and appointed, granted, bargained, sold, released, ratified, and confirmed the said manor &c, to *Martin* in fee. That upon the execution of the last mentioned indenture, the sum of 5180*l.* part of the consideration money, was paid by a draft or check drawn by *Martin* on the house of Messrs. *Martin* and Co. (in which house *Joseph Martin* was then a partner) in favor of the first mentioned *Richard Willis*, or bearer; and which draft or check was delivered by *Martin* to *Cruttenden*, and by *Cruttenden* for form's sake to *Richard Willis* and *Mary Willis* executor and executrix, and by them (*Richard Willis* and *Mary Willis*) to *Robert Willis*, the infant, for form's sake; and that the draft or check was finally taken from *Robert Willis* the infant by the first mentioned *Richard Willis*, in the presence of *Cruttenden*, and by him the first mentioned *Richard Willis* applied to his own use; and that the residue of the consideration money was duly paid by *Martin*, in satisfaction of a mortgage on the manor, &c, charged thereon before the making of the indenture first mentioned. The verdict then stated that *Martin* had personally no intention to defraud the children of the first mentioned *Richard Willis* and *Bethia* his wife, or to defeat the settlement, but that *Cruttenden*, being such agent as aforesaid, and the first mentioned *Richard Willis*, fraudulently combined together to procure the purchase-money to be paid into the hands of the first mentioned *Richard Willis*, and which was accordingly effected by means of the proceedings aforesaid, and which proceedings were by *Cruttenden* and the first mentioned *Richard Willis* calculated for that purpose; and that no part of the purchase-money was ever laid out, or invested, by *Robert Willis*, the infant, or any other person or persons, in the purchase of other freehold messuages, lands, &c, pursuant to the proviso in that behalf contained in the indenture of the

the 15th of February 1757. The verdict then stated that in 1790.
Hilary term, 9 Geo. 3. a fine sur conusance de droit come ceo &c. was
 levied of the premises in question by Richard Willis and Bethia ^{Hilary 9 Geo. 3. fine}
 his wife to Joseph Martin. That on the 21st of December 1775 ^{DOETH Martin.}
 Joseph Martin by will devised to the defendants and their ^{against}
 heirs upon certain trusts therein mentioned, and died in March ^{MARTIN.}
 1776; on whose death the defendants entered &c. In 1778 ^{21. Dec. 1775.}
 Bethia Willis died; and in 1780 the first mentioned Richard Willis ^{Martin devised}
 also died, without making any appointment by virtue of the ^{to def. in fee}
 power contained in the release of February 1757. On Richard ^{on certain trusts,}
 Willis's death Richard Legg Willis was beyond the seas, and did ^{& dies in March}
 not return till the latter end of the year 1785; James Willis was ^{1776, & his wives}
 then an infant, of the age of 19 years; Bethia A. Willis was of ^{in 1770 Bethia}
 the age of 18 years; and Mary Willis is still an infant. Thomas ^{Willis dies, & in}
 Willis, having survived Richard Willis and Bethia, died in 1782, ^{1780 her husband}
 being then an infant; after whose death and within five years ^{Rich. dies.}
 next after Richard Legg Willis returned to this country, and
 James Willis and Bethia A. Willis, attained their respective
 ages of 21 years, and before the time when &c, they the said
 Richard Legg Willis, J. Willis, B. A. Willis and M. Willis, in
 due form of law entered &c, in order to avoid the fine; and
 thereupon became seised &c, and being so seised, caused an action
 to be commenced for trying the title &c, within one year next
 after such entry, which action is now prosecuting with effect,
 according to the form of the statute &c. And after such entry,
 and while they were seised, they demised to the plaintiff &c, who
 entered, and was possessed thereof until the defendants entered
 and ejected him &c. But whether &c.

This verdict was argued three several times; first by Jekyll
 for the plaintiff, and Gibbs for the defendants, in Hilary Term
 1790; a second time by Watson Serjt. for the plaintiff, and by
 Lawrence, Serjt. for the defendants, in Easter Term last; and
 on this day by Morris, for the plaintiff, and Wilson, on behalf
 of the defendants.

Arguments for the lessors of the plaintiff. First, The li-
 mitations to the children of Richard and Bethia Willis, created
 by the marriage settlement, were not concurrent contingent re-
 mainders to wait for the death of the survivor of the father and
 mother, but were vested remainders in all and every the children
 as they came in esse, though liable to be divested during the life
 of the father or mother by a legal appointment. 2dly, In
 default of appointment, all the children took a fee and not
 merely

Argument for
 lessors of plaintiff.
 5 points made.

1790.

DOE
against
MARTIN.

1. Part.

The statute
enacts

merely *estates for life*. 3dly, The lessors of the plaintiff were not barred either at common law, or by the operation of the statute of *Ann (a)*, even if the whole transaction had been *bonâ fide*. 4thly, Certainly not, as the transaction was fraudulent; for though the verdict negatives a personal fraud in *Martin*, yet in point of law he is involved in the fraud by the act of *Crutten-den*, his agent. 5thly, But, even if the deed of revocation were nevertheless valid, the legal estate resulted to the releasees. First, The premises are limited to the wife for life, remainder to the husband for life, remainder in fee to vest on the birth of the first child, subject on the birth of other children to be proportionably devested and expand; and liable to two powers apparently controlling the operation of the deed; the one, to revoke old uses, the other to appoint in portions; the first giving or leaving to the releasees an estate; the latter not so applying as to suspend the vesting of the remainder. This question arises on a marriage settlement, the great object of which was to make a provision for the children: Now if the want of an appointment were to suspend the vesting of the remainders during the lives of the father and mother, and make them contingent, it would be in the power of the parents to disinherit the children altogether, and thus the primary object of the settlement would be defeated. But this defect may be remedied by considering the releasees as trustees to preserve the contingent remainders, though not specifically made so. For in cases where estates are *devised* in trust, there is no necessity for particular trustees to preserve the contingent limitations; the freehold in the trustees in the general is sufficient for the purpose. Trustees in such cases have a fee where the purposes of the trust require it, though there be no specific words of limitation. 1 *Vez.* 268. 491. 3 *Burr.* 1686. *Hopkins v. Hopkins*, *Cas. temp. Talbot* 44. and 1 *Atk.* 581. The statute 10 & 11 *W. 3. c. 16. s. 1.* is a legislative exposition of this principle; for that declares that, where an estate is by a settlement limited in remainder to the first and other sons of any person, with remainders over to the use of any other person, any son or daughter of such person born after the decease of the father may take such estate as if he had been born in the life-time of the father, though no estate be limited to trustees to preserve contingent remainders. Here the estate limited to the trustees was a trust and not an use; or if it were an use, it was an use executed in them: for otherwise the estate limited to the wife for her sole and separate use could not be secured to her, but

(a) 7 *Ann. c. 19.*

must fall under the husband's control. A remainder must vest during the existence of the particular estate; if to persons in *esse*, it vests presently; if to persons not in *esse*, it is contingent: yet those contingent uses, when they happen, vest by *interposition*, if the first estate for life which ought to support them be not disturbed. The doctrine of vesting by interposition is laid down in *Napper v. Sanders*, *Hutt.* 119. *Chudleigh's Case*, 1 *Rep.* 133. In *Napper v. Sanders*, there were two prior contingent remainders, and the third vested: Now here if there were no appointment by the parents jointly, or by the survivor, for want of such appointment the remainder over was vested. So in Lord *Derby's* case, *Lit. Rep.* 370. where a remainder is limited to a person in *esse*, so as to depend on a contingency, this contingency may be considered as confined to such remainder without extending to subsequent limitations. *Tracy v. Letheulier.* 3 *Atk.* 774. So here if the limitation depending on the appointment of the parents, or the survivor, failed for want of appointment, the limitation over took effect. The two first are contingencies, but do not affect the third limitation for want of appointment. This case is distinguishable from that of *Lodding v. Kime* (a), and cannot therefore be governed by it. Here the limitation to the children became vested on the birth of the first child, liable however to be divested on the subsequent births of the younger children. And it was admitted in that case (b) that if the tenant for life had had a son, such son would have taken a vested remainder. Now here a child was born before any act was done to bar the remainders. If A. make a feoffment to the use of his wife that shall be, and his first begotten son, for their lives, and A. afterwards marry, his wife shall take the whole use, and if he afterwards have a son, that son will take jointly with the wife. *Dy.* 339. *Bac. Law Tr.* 351. *The Earl of Essex v. Temple.* 1 *Lord Raym.* 310; and *Matthews v. Temple*, *Comb.* 467. are to the same effect. It is no objection that these estates commence at different times. *Oates v. Jackson.* 2 *Stra.* 1172. *Co. Lit.* 188. Had the power of appointment in this case been executed, these interests of the children would have been divested: but there was no appointment; and therefore as the trust still continued to support the remainders, and as the words of inheritance on the construction of trust deeds are referable to the first mentioned class of issue, the remainder to these children was vested. The power of appointment was no more than a

1790.

DOE
against
MARTIN.

(a) *Lord Raym.* 203. *Salk.* 224. *Vin.* 41.
A'r. Title "Remainder" pl. 23.

(b) *Lord Raym.* 208.

dormant

1790.

DOE
against
MARTIN.

dormant power, and till that was exercised, the remainder vested *sub modo*. It is not the uncertainty of taking in possession which makes a remainder contingent; for he in remainder may in any case die before the determination of the particular estate, but the chance of such a casualty would not make his interest less vested. So where an estate is limited to *A.* for life, remainder to his first and other sons in tail, remainder over to the first and other sons of *B.*; upon the birth of a son of *B.* the remainder would vest in him, liable to be divested on the birth of a son of *A.* There is no distinction between that case and the present. Here the remainder vested in interest on the birth of each child, liable to be diminished as to the *quantum* only on the birth of other children, unless some act were done, namely, an appointment by the parents to any particular child or children; and the Court will always lean against construing remainders to be contingent; for it is a general rule not to permit the fee to be in abeyance longer than is absolutely necessary. And besides the intention is liable to be frustrated in such cases, by leaving it in the power of the tenant for life to defeat the subsequent limitations in all cases where trustees to preserve the contingent remainders are not interposed. *Carter v. Earnardiston*, 1 P. Wms. 516, 517. But the case of *Cunningham v. Moody* (a) is expressly in point: there money having been agreed on a marriage to be laid out in the purchase of lands to the use of the husband and wife for life, remainder to the children in such proportions as the parents should appoint, and in default of appointment to all equally, Lord Hardwicke said, that the power of appointment did not prevent the subsequent estates from being vested, though liable to be divested on appointment. This was a case determined by Lord Hardwicke on great consideration, and upon a review of the opinion which he had before thrown out in *Walpole v. Lord Conway* (b), and is therefore the more to be relied on. The same authority too considerably shakes the second resolution in *Leonard Lovie's* case (c); of which it may also be observed that it is merely the *obiter* opinion of the Chief Justice, and extrajudicial, it not being the point immediately before the Court. Secondly, the children took a fee in default of appointment, and not merely *estates for life*. The limitation was (for want of appointment) "to the use and behoof of all and every the said child or children, equally, share and share alike, to have and to hold the same, if more than one, as tenants in common,

see 2 Ves.
Jun. 70A.2^d Point.

(a) 1 Ves. 174. (b) 3 Barnard. 153. (c) 10 Rep. 85. a.

and not as joint tenants, and if but one child, then to such only child, his, or her, heirs or assigns for ever." In the construction of deeds as well as wills regard is always had to the intention of the parties: and the intention in this case may fairly be collected from the whole deed to be this, that the *child or children* of the marriage, whether one or many, should take a fee; for if the several children (there being more than one,) took only estates for life, and one of them had a child, that child would take nothing. The two branches of this sentence, on which the question arises, may be coupled together, and then the word "heirs" may be taken as relative to both. This may be easily done, and the same rendered complete, by putting the words "to hold the same if more than one, as tenants in common, &c, and if but one child then to such only child" into a parenthesis; and then it will run thus, "and for want of such appointment, then to the use of all and every the child or children, equally, share and share alike, his or her heirs and assigns for ever;" or the word "their" before the word "heirs" may be supplied even in a court of law, in order to effectuate the intention of the parties. In *Robinson v. Robinson* (a) where an estate for life and no longer was expressly limited to the first taker, the Court held that he took an estate tail in order to effectuate the deviser's intention. On the same principle in *Evans d. Brooke v. Astley* (b), where an estate tail-male was expressly limited to the three first sons of the deviser's sister, and in default of such issue, to every son &c, the fourth son took the same estate as the three others. In 3 *Bullst.* 127. *Croke J.* put this case; a devise of *Blackacre* to the eldest son and his heirs, for his part or portion, and of *Whiteacre* to his youngest son for his part, omitting the word "heirs," the youngest took the same estate in *Whiteacre*, that the eldest took in *Blackacre*. As the word "heirs" was supplied in that case, the word "their" may in the present. Thirdly, that the lessors of the plaintiff are not barred at common law by the acts of the infant trustee, *Robert Willis*, clearly appears from the preamble of the statute 7 *Ann.* c. 19; which recites that inconveniences had arisen from the inability of persons under age having lands &c, only in trust or by way of mortgage, (though by the direction of the *cestui que trust*, or mortgagor,) to convey any estate in such lands; and to remedy that inability the statute was passed.

1790.

Doe
against
MARTIN.3. *Prints*(a) 1 *Burr.* 38. (b) 3 *Burr.* 1570.

1790.

DOE
against
MARTIN.

Neither are the lessors barred by the operation of this statute (c); for it directs with great caution that all parties concerned shall really and substantially, and not colourably, appear before the court at the making of such order. And in the construction of this statute it has been determined in the Court of Chancery that they will not make an order but in the plainest and most unequivocal cases; namely, where the infant is a *bare trustee*, not in ambiguous cases where the *trust is merely constructive*, or the infant has an interest in or a claim to the estate. *Ex parte Vernon* 2 P. Wms. 549. *Goodwin v. Lister*, 3 P. Wms. 387. *Hawkins v. Obcen*, 2 Vez. 559. Now when this order was obtained in chancery, there is no pretence to say that *Robert Willis* was a trustee within the meaning of the statute. The uses of the settlement were all executed, and not revoked at that moment: the order therefore was void; for the subject of it was not within the jurisdiction of the Court, inasmuch as that jurisdiction will never be exercised but in the case of a *mere trustee*. If it had been otherwise, and the uses had been revoked previous to the order, and it had been consequently intended to be a resulting trust to the infant, still it was not a trust within the definition of those trusts under the scope of the statute. For it was not a trust merely for the benefit of the father or mother of the lessors, of the plaintiff, who revoked the uses, but *for the benefit of their children also*; who should have been brought before the Court, as parties interested, before the making of the order, as is made necessary by the direct requisition of the statute. Nor was it a trust merely for the infant *to convey* the estate; he was also *to receive and to lay out the purchase-money*, which was an act of discretion beyond the capacity of an infant; and for which exercise of capacity the infant was not a trustee within the statute. If

(a) Which enacts that it shall and may be lawful to and for any such person or persons, under the age of one and twenty years, by the direction of the High Court of Chancery, or the court of Exchequer, signified by an order made upon hearing all parties concerned on the petition of the person or persons, for whom such infant or infants shall be seised or possessed in trust, or of the mortgagor or mortgagors, or guardian or guardians, of such infant or infants, or person or persons entitled to the monies secured by or upon any lands, tenements, or hereditaments, whereof any infant or infants are

or shall be seised or possessed by way of mortgage, or of the person or persons entitled to the redemption thereof, to convey and assure any such lands, tenements, or hereditaments, in such manner as the said Court of Chancery, or the Court of Exchequer, shall by such order so to be obtained direct, to any other person or persons; and such conveyance or assurance so to be had and made as aforesaid shall be as good and effectual in law, to all intents and purposes whatsoever, as if the said infant or infants were, at the time of making such conveyance or assurance, of the full age of twenty-one years.

it

It be admitted that this case cannot be supported under the statute, but it be contended that it may nevertheless be good at common law, and *Zouch d. Abbot v. Parsons* (a) be cited to prove it; it may be observed that that case is essentially different from the present. There the question was whether an infant's conveyance by lease and release were absolutely void or only voidable. In that case the infant was between 16 and 17 years old; the money was paid into proper hands (on which Lord Mansfield laid considerable stress;) and there was no fraud. In the present case the infant was only five years old; the money was paid into improper hands; and fraud is found. But, fourthly, whatever consideration this question might have deserved had the transaction been *bona fide*, it is found to be fraudulent, and therefore the whole is vitiated. As anciently as *Twyne's* case (b) fraud was held to vitiate a conveyance; judgments are also void on that ground; warrants of attorney; 2 *Str.* 1043. *Cas. temp. Hardwicke* 233. *Cowp.* 728. and *Dougl.* 186; and *Fines. Bracton* 436, 437. *Cro. El.* 531. 3 *Rep.* 80. 5 *Rep.* 68. *Totbill.* 99. 12 *Rep.* 123. *Shepb. Touch.* 18. and *Jenk.* 254. The history of the fraud in this case is sufficiently apparent on the verdict; the object of it was to procure to Richard Willis the produce of the sale of the estate; and this could only be effected by a mis-representation to the Court of Chancery, and by fraudulently concealing in the master's report the application of the purchase-money as directed by the proviso in the marriage-settlement. Cruttenden knew that the money was never to be laid out in the purchase of another estate pursuant to the proviso, but to be so paid under the direction of the Court that the father of the lessors of the plaintiff might receive it; for it is expressly stated in the verdict that part of the money was only paid into the hands of the infant *for form's sake*, and that it was taken from him by Richard Willis in the presence of Cruttenden. *Le Neve v. Le Neve*, 3 *Atk.* 646. *Brotherton v. Hat*, 2 *Vern.* 574. and *Jennings v. Blincorn*, 2 *Vern.* 609. If it be said that all which Cruttenden did fraudulently was as the agent of Willis, yet the mis-application of the purchase-money, to which the fraud tended, was certainly the act of Cruttenden as Martin's attorney; and if Martin were not to suffer by this, he would derive an advantage from his agent's fraud. In *Fitzherbert v. Mather* (c), it was held that the prin-

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against
MARTIN.4th Print.(a) 3 *Burr.* 1794.(b) 3 *Rep.* 80.(c) *Ante* 1 vol. 12.

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The payment
to the executors of
the surviving trustee
was under
the order of the
testator, and
not a charge
upon the estate.
I do not suppose
proceeded on
the idea of its
being improper
to pay to the
infant heir.

principal was bound by the misrepresentation of his agent. In that case *Ashhurst*, J. said "On general principles of policy, the act of the agent ought to bind the principal, because it must be taken for granted that what the agent knows the principal knows." Besides here the purchase-money was by the express terms of the proviso to be paid to the *heirs*; the payment therefore to the *executors*, which is here stated, cannot be supported. This then affects the revocation itself with fraud, since it was a feature of *Cruttenden's* contrivance to assist the sale. But if it be said that the revocation may be separated from the subsequent application of the money, and that as far as respects the revocation itself it may be supported, it may be insisted by way of answer that, as the power of revocation was not *general and absolute*, but merely *conditional*, the deed of revocation was in itself void, because neither accompanied or followed by a due appointment. A power must be strictly pursued; it is in the nature of a condition, and cannot be effectual unless all the circumstances prescribed by it be pursued. 3 *Ch. Cas.* 66. But here the purchase-money was neither raised, paid, or invested, according to the requisitions of the power. And the power of revocation, and the power of conveying, are so interwoven that the act of revocation cannot be supported because it was neither accompanied or followed by a conveyance from the trustees, and a subsequent re-investing of the purchase-money to the same uses. The latter was an integral part of the condition; it was of the essence of the power; and the whole execution of it falls to the ground, because not precisely and specifically pursued. If the power were imperfectly executed, the revocation is a mere nullity. And nothing can be clearer than that if the transaction were commenced with a view to the fraud, no part of it is available to any intent or purpose whatsoever. As to the fifth point; the same deed, which gave a power to revoke the old uses as to the premises settled, prescribed specifically what fresh uses should be limited, namely, that the trustees should still have in them the legal estate for the purpose of conveyance to the purchaser, and that the fruit of that conveyance, the purchase-money, should be re-invested by them the trustees in the purchase of other estates liable to the same uses. The application to the Court of Chancery was on a suggestion that, on the execution of the power of revocation, the legal estate would result to the trustee: The Court admitted it would; for the reference to

5th Point.

the master was merely to report whether the trustee infant were within the statute of *Ann.* It cannot be contended by the defendant from what is said in *Co. Lit.* 237, where powers of revocation are mentioned as novelties since *Littleton's* time, that *Bethia Willis* had a fee by the revocation, for there is a provision in this deed tantamount in operation to a power to limit new uses, since the trustees are expressly to stand seised to that effect. They had not merely the *scintilla juris*, spoken of in *Chudleigh's* case (a); for they were to convey in case of a revocation, which necessarily implies that they were still seised of the estate. So that if the revocation were valid, the legal estate is in the trustees and did not result to *Bethia Willis*. If so, there was nothing, on which the fine levied by *Richard* and *Bethia Willis* could operate. Either the fine was infected by the fraud, as part of the transaction, and void on the grounds mentioned in the fourth head of argument; or, if separated from the rest, and the revocation were good, it passed nothing to the defendants' ancestor, the cognizors having no interest to convey.

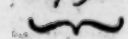
Arguments for the defendants. 1st. The limitation to the children of *Robert* and *Bethia Willis* was not a vested, but a contingent, remainder; and therefore, by the destruction of the precedent life estate before the contingency happened, that remainder fell of course. Lord Ch. J. *Willes* in delivering the opinions of the Judges in *Smith d. Dormer v. Packburst* (b), in the House of Lords, states two heads, under which all contingent remainders may be reduced; 1st, Where a remainder is limited to a person not in being, and who possibly may never exist; 2dly, Where a remainder depends upon a contingency collateral to the continuance of the particular estate. The birth of the children in this case made this a contingent remainder of the second sort: for whether all, or which, of the children should take, and what estates they should have, was a matter perfectly undefined by the settlement, and depended upon an appointment according to the terms of the settlement, or the neglect of an appointment; either of which is a contingency independent of the determination of the first estate, the continuance of which had no sort of connection either with the appointment or the neglect of it. But as it was uncertain whether or not such an appointment would ever take place, it necessarily follows that the estates which were to take place according to the one event or the other must be equally uncertain; in the same

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against
MARTIN.Argument for
Defendants.

1.

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manner as the example, put by Lord Ch. J. *Willes* in the case cited, of the second kind of contingent remainders, where after an estate for life limited to *A.* the remainder was to *B.* in fee after the death of *J. S.* or after *J. S.* should come from *Rome*. Now here the appointment or non-appointment was equally contingent and collateral to the continuance of the particular estate, as the death of *J. S.*, or his coming from *Rome*, was in the instances there put. According to the second resolution in *Leonard Lovie's* case (*a*), where the grandfather by indenture limited to himself an estate for life, with power to lease &c, and to the use of the performance of his last will, and to the use of any persons to whom he should devise any estates, remainder to *W. L.* in tail &c.; this and all the subsequent remainders were held to be in contingency, and not executed till the death of the grandfather. And this has been recognized in other cases, in *Loddington v. Kime*, 1 *Ld. Raym.* 208. and in *Roll. Abr.* So in *Plunket v. Holmes* (*b*), where the devise was to her son *T.* for life, [who was also heir,] and if he die without issue of his body living at the time of his death, then to *L.* and his heirs; but if *T.* have issue living at the time of his death, then the fee to remain to the right heirs of *T.*; there it was held that *T.* took an estate for life, remainder to *L.* in fee, on the event of *T.*'s having no issue living at his death, remainder to the right heirs of *T.* on the contingency of his having issue; and therefore a common recovery suffered by *T.* destroyed *L.*'s contingent remainder. So here *Willis* and his wife took estates for life, remainder to all the children, on the event of there being no appointment, remainder to the appointees, in the event of an appointment; therefore the consequence is the same, and the contingent remainder to the children is defeated by the deed of revocation, and the subsequent acts. The case of *Loddington v. Kime* (*c*) is of the same sort. There the devise was to *A.* for life, without impeachment of waste, and in case he have any issue male, then to such issue male and his heirs, and if he die without issue male then to *B.* and his heirs: the first remainder to the issue male of *A.* was held a contingent fee; so was also the subsequent remainder to *B.*; not contrary to, but concurrent with, the former, and was a contingency with a double aspect; for if *A.* had issue male, then the remainder had vested in such issue male in fee; if he had no issue male, at his death the remainder to *B.* took effect.

(a) 10 *Rep.* 85. 2. (b) *Sir T. Raym.* 28. (c) 1 *Ld. Raym.* 203. 1 *Sa'k.* 224. S. C.

In like manner this may be said to be a contingency with a double aspect: if the husband and wife died without making an appointment, then the remainder to the children vested; if with an appointment then the estate vested according to such appointment. And as the power of appointment exhausted the whole fee, every limitation over in default of it must necessarily be contingent, and consequently such was the limitation to the children in this case, in default of appointment. That this was a contingent remainder appears also from the definition given by Mr. Justice *Blackstone* (a) of this species of limitation. Remainders (says he) are either *vested* or *contingent*. *Vested* remainders, or remainders *executed*, whereby a present interest passes to the party though to be enjoyed in *futuro*, are where the estate is *invariably fixed*, to remain to a *determinate person*, after the particular estate is spent. *Contingent* or *executory* remainders [whereby no present interest passes] are where the estate in remainder is limited to take effect, either to a *dubious and uncertain person*, or upon a *dubious and uncertain event*. To try this question by these rules: on the birth of a child no estate became invariably fixed to remain to him as a determinate person, after the determination of the particular estate; but on the contrary, as he might have all or none according to the act of his parents, as well the *persons* to whom the estate was to remain, as the *event*, were dubious and uncertain; so that all the criteria of a *contingent* remainder are here to be found, and none of a *vested* one. It is the uncertainty of a remainder's taking effect, even though the subject matter survive the particular estate, which denominates it contingent; now here though all the children survived their parents, yet the power of appointment might be so exerted as to defeat the remainder limited to them. Nor is it on the other hand the present capacity of taking in possession as soon as the particular estate shall determine which renders a remainder vested; that was determined by *Lodding v. Kime*; for till the tenant for life should have a child, the next in remainder was capable of taking in possession; and yet there the remainder was held to rest in contingency: and though it was urged that on the birth of a son in that case the remainder limited to such son would have become instantly vested, yet that was because the non-existence of such person was the only thing that made the contingency; whereas here the contingency also rests on there being no appointment. As to these limitations being by way of use, that will not make any difference.

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(a) 1 Bl. Com. 168.

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10 Co. 85. For though it has been argued that, as this conveyance is by way of use, it may vest and divest, that does not alter the nature of the question: no authority has been cited to shew that the remainder to the children in this case was a vested remainder liable to be divested; and whether a remainder be vested or not, which is limited by way of use, must be determined by the same considerations as if the question arose on a common law conveyance. The capacity which an estate, limited by way of use, has of divesting does not at all contribute to vest it; before that quality can be called forth it must have vested; and from that no argument can arise to shew that it vested any more than from a condition being annexed to an estate at common law. The same circumstances which create uncertainty as to the one sort of estate must have the same operation with respect to the other. And whether an estate be limited *by way of use* to A. on his return from Rome, or *by a deed of feoffment* on the same event, it must be equally contingent. If this distinction had any foundation, it would equally have applied to the cases of *Plunket* and *Holmes*, and *Loddington v. Kime*, and would have converted the remainders in those cases, which were held to be contingent, into executory devises, liable to vest and divest, on certain events. As to the case of *Cunningham v. Moody* (a) which was chiefly relied on to shew that this was a vested remainder, the determination in that case does not come up to the present; for that was a question whether the fee vested in the father or not, and not whether the several remainders to the children were vested remainders; for if the fee were vested in the father, it followed that the plaintiff was entitled, who was a sister of the half blood. That case only decided that the power of appointment did not put the fee in abeyance; and does not prove that the remainders to the children were vested. It goes no further than other cases, deciding that which is a known rule as to contingent remainders, namely, that where a remainder is limited in contingency, the fee in the mean time remains in the grantor and his heirs, subject to the contingency. It was so held in *Plunket v. Holmes* (b), *Purefoy* and *Rogers* (c), and in *Lewis Bowles's* case (d), which is referred to by Lord Hardwicke in the case in *Vezey*, as the ground of his determination. And that furnishes a sufficient argument in answer to the reluctance of the law, which has been urged, to the fee's remaining in abeyance; for here the ultimate remainder in

(a) 1 Vez. 174. (b) Sir T. Raym. 28. (c) 2 Saund. 380. (d) 11 Rep. 79. b. fee

fee might be held to continue in Mrs. *Willis*, the settlor, during all the time that the remainder to the children rested in contingency; though it is not necessary for the defendants to insist on that point. And it is to be observed that in *Lewis Bowles's* case all the limitations were *in tail*, which distinguishes it materially from the present, because after a contingent remainder in tail a subsequent remainder may be vested; for even supposing the contingent remainder to become vested, the other is still expectant upon it, the fee not being all disposed of. But after a contingent limitation *in fee* no other limitation can be vested, because if the contingent remainder take effect, it absorbs the whole fee. Not only the point relied on in *Cunningham v. Moody* was not before the Court, but it appears that Lord *Hardwicke* held a very different opinion in another case, that of *Walpole v. Lord Conway* (a). There money was directed to be laid out in lands, to be settled to the use of *Francis Lord Conway*, for life, remainder to his intended wife, for life, remainder in trust for such child or children, and for such estates absolutely or conditionally &c, in such proportion as *Francis Lord Conway* should appoint; and in default of such appointment to the use of all and every the daughters, younger sons, and the heirs of their bodies &c. One question which arose there was, whether a son of one of the daughters was entitled to his mother's share, and that depended upon the question, whether the remainder to the daughters &c were contingent or vested, liable to be divested on the appointment: as to which Lord *Hardwicke* said "The late Lord *Conway* had a power " during all his life-time to limit the estate amongst the daughters and younger sons, in such manner as he thought proper; and therefore during all that time the remainder over " to those children, in default of such appointment by the father, " must have been contingent." and his Lordship relied on the 3d and 4th resolution in *Lodding v. Kime*. And though it is stated at the end of the case that his Lordship had entertained a doubt while he was speaking as to this share, yet that doubt was not as to the remainders resting in contingency, for that is expressly declared against, but whether, taking it to be such, the issue according to *Archer's* case would not be entitled to

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(a) Mr. *Wilson* observed that he quoted this case from *Barnardiston's Rep. in Cb. 153*, which he had compared with the Register's book, and found very accurate. The only difference was, that the case was entitled *Walpole v. Lord Clarendon*, he being the first named defendant, and the name of *Pring* was used instead of that of *Brigge*.

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stand in the place of his mother, who died before Lord Conway. Secondly, the children, for want of appointment, took only estates for life: for it appears that it was not intended that any but *an only child* should take a fee; as the word "*heirs*", which is inserted in the latter part of the clause, limiting the estate in case there should be only one child, is omitted in the first part, whereby, in the event of there being more than one, it is limited to them as "tenants in common", omitting the word "*heirs*". But it has been said that there is a mere clerical omission of the word "their" before "heirs," which the Court ought to supply, in order to give effect to the intention of the parties: but that is begging the question. The grammatical construction is full and complete without the insertion of that word; and supposing the intent of the settlors to have been to give only estates for life in the event of there being more than one child, it could not have been expressed in more apt words than those used. Nor would the parenthesis contended for cure the defect; for still the word "*their*" must be supplied. And in this respect "*their*" is as important an omission as the word "*heirs*": if the Court cannot supply the one, they cannot supply the other. It is impossible to determine with certainty that the settlors meant any thing else than is expressed. But even if the Court could conjecture that such omission had been made by accident, they would not be warranted in supplying it even in the case of a will, and still less in a deed. It has been long settled that in a deed no words can supply the word "*heirs*" although the intention of the party to pass a fee be manifest; and although words are used which in a devise would have passed the fee. It was so held in 1 *Leon.* 2. where, the word "*heirs*" being omitted in the granting part, it was resolved that the fee did not pass, though it were used in the reciting part. In *Littleton* f. 1. it is said, "If a man would purchase lands or tenements in fee-simple, it behoveth him to have these words "in his purchase, "to have and to hold to him and to *his heirs*;" for these words, *his heirs*, make the estate of inheritance: and *Littleton* proceeds to state that the words "to hold to him for ever", or "to him and *his assigns for ever*", give but an estate for life for want of the word "*heirs*"; and Lord Coke in his Commentary thereon (a) says, "if a man give land unto two, "to have and to hold to them two, *et hæredibus*, omitting *suis*,

(a) Co. Lit. 8. b. and 1 Rol. Abr. 833. M.

"they have but an estate for life for the uncertainty". Now this case is much stronger against the fee passing; for here the words are quite plain. Nor is it unnatural that the parents should wish to favour the heir at law in the one event, and not in the other; nor have the Courts been governed by any such consideration in their construction even of wills, where the apparent intention of the deviser as against the heir is more favoured than in deeds; for in *Right lessee of Mitchell et ux. v. Sidebotham* (a), where the deviser "gave and devised to A, her heirs and assigns for ever, all his lands at B, and gave and bequeathed to A aforesaid all his lands at C"; it was held that A took only an estate for life in the lands at C, although there were introductory words purporting an intention to dispose of all his property, and although he had given a disinheriting legacy of 1s. to the heir: that case is stronger than this, for there the limitations were to the same person; here they are to different persons. In *Doe v. Morgan* (b) Lord Kenyon said that deeds had always been construed more strictly than wills, and that established rules ought not to be departed from. The consequence of this is that the defendant is at least entitled to judgment for one fifth, one of the children being dead. It was also observed that there was some ambiguity in the special verdict as to the time when the youngest child was born. From comparing the dates it is clear that she was not born at the time of the revocation; and it remains doubtful, whether she were born before or after the fine: then as the estate limited to the children was clearly contingent till the time of their respective births, as to one fifth part no demise could be made at all unless it appeared that she was born before the fine. Thirdly, Supposing the lessors of the plaintiff right upon the two other points, it will remain to be considered how far the fraud found by the special verdict affects the transaction, so as to divest altogether the legal title acquired by the defendants' ancestor. This question involves in it several considerations. It is not meant to be contended that *Cruttenden* is not to be considered as the agent of *Martin* in point of law, and that the latter is not implicated in the fraud of the former: but it does not follow that, because some part of the transaction was fraudulent, the whole must be avoided. If the legal forms which have been gone through may stand without injury to the children, there is no reason why that part of the

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(a) Dougl. 730.

(b) Ante, 3 vol. 765.

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transaction should not have its due operation, and be separated from the subsequent acts which are infected by the fraud, and operate against the children. This will depend first upon the validity of the deed of revocation. The power of revocation is not by the terms of the settlement required to be executed by the same deed as the power of appointment and conveyance to the purchaser: and it cannot be contended that, if at a time subsequent to the revocation the purchase-money had been properly applied, the conveyance to *Martin*, if properly executed, would not have been good. If that be so, the validity of the revocation cannot depend on the subsequent transaction, and be valid or not according to the proper or improper application of the money afterwards. By the general rule of law every deed takes effect from its delivery; and if the parties intend that it shall not operate until the performance of some condition or the happening of some event, the proper and only means of effecting this is to deliver the deed as an escrow. *Degory v. Roe*, 1 *Leon.* 152. Now if the revocation were good, there could be no estate remaining in the children. Again, the conveyance to *Martin* was also good, for the children were not injured by that; and it was made pursuant to legal forms. The next consideration was the application of the purchase-money; and there it was that the fraud began: for the parents had a right to sell the estate under the power of revocation; but they had no right to apply the purchase-money to their own use. What the children then have to complain of is not that they have lost the land, but the money which arose from the sale of it: and their remedy is in equity against the representatives of *Martin*, who, being a purchaser with notice of their claims through the fraud of his agent *Cruttenden*, must make good again the purchase money, to the application of which he was bound originally to have attended, and the estate will perhaps remain liable in his hands as a security for the amount: but a court of equity would not overturn the legal title acquired by him. This is the mode of administering relief constantly pursued in similar cases. If an estate be sold charged with an incumbrance of which the purchaser has notice, but neglects to look to the application of so much of the purchase-money; upon a bill filed for relief on the part of the person who had the lien, the Court of Chancery would not overturn the conveyance in *toto*, but they would still hold the estate answerable for that sum. Or suppose the charge were to the full value of the estate, still the conveyance would not be void

void at law, but the purchaser would be liable to pay over again the whole purchase-money to the person beneficially entitled. The same rule applies equally to the present case: fraud does not vitiate, by relation back, more of a transaction at law than is sufficient to do justice to the party injured. If a trustee to preserve contingent remainders, convey to a purchaser with notice, the *legal* estate is thereby conveyed; but a court of equity will consider the purchaser as taking the land subject to the *trust*; as was held in the case of *Mansell v. Mansell* (a), and *Pye v. Gorge* (b). Now, in those cases, if the fraud had vitiated the whole transaction, the Court of Chancery would have sent the question to be tried at law: whereas, on the contrary, the purchaser was decreed to join in the conveyance, which affirmed his *legal* title. And besides, the children here have their remedy at law against the executors of *Martin*. But, upon the finding of the facts in the special verdict, some part of this transaction stands perfectly clear even of implied fraud on the part of *Martin*. For it is expressly stated that *Martin* had *personally no intention to defraud the children*. And as it further appears that the contract for the purchase was made between *Martin* and *Richard Willis*, without the intervention of *Cruttenden*, that part of the transaction stands free from fraud; and the fraud can only attach upon the misapplication of the purchase-money, for which the remedy of the children is in equity against the executors of *Martin*. Fourthly, If it appear that the legal and formal part of the transaction may be separated from the subsequent fraud, and that the deed of revocation was good taken simply by itself; it follows that the *legal* title is in the defendants, under which they may protect themselves in a court of law. That depends on the question, in whom the legal estate was after the deed of revocation. The effect of the Statute of Uses in this case was to execute all the uses in *esse*, and to leave in the releasees no estate but that *scintilla juris* or possibility which might be sufficient to serve the new uses when they might arise, but not sufficient to support the contingent remainders. *Chudleigh's case*, 1 Co. 120. If there were no use in *esse* at the time of the determination of the estate of *Willis* and his wife, the consequence is that no estate could be executed in the children, and the limitation to them must fail for want of a prior estate to support it, unless the words directing *Bracebridge* and *Robert Willis* to convey the estate to a purchaser necessarily imply that the estate

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(a) 2 P. Wms. 678.

(b) 1 P. Wms. 128.

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must be vested in them for that purpose, and unless that estate will support the contingent uses. But no estate can be implied in the trustees, except on a supposition of a regular valid revocation of the uses limited by the settlement. For there could be no estate in the trustees but as a new springing use to arise on the revocation, and not from any *tortious act* of *Willis* and his wife, conveying a greater estate than by law they could, and destroying that estate out of which the uses were to arise. As in *Chudleigh's case* (a), it was agreed that the feoffment made by the feoffees devested all the estates and the future uses also; and then the new estate could not be subject to the ancient uses which arise out of the ancient estate devested by the feoffment. Here the settlement reserved a power of revocation to *Willis* and his wife; and the direction to the trustees to convey was in effect giving them a power of appointment which might be very well reserved to them without implying any estate in them, as a power simply collateral; the purchaser would then be in under *Willis* and his wife, and not under the trustees; as in the case put in *Digge's case* (b), where if executors or feoffees, who have power by the will of *cestuy que use* to sell the use, make a feoffment of the land to the former use, yet they may sell the use; for the same use, which was devised to be sold, remains untouched by the feoffment; and after the sale the vendee shall be in by the devisor, and not by the feoffees. Their authority is like the case put in *Co. Litt.* 265, b; where Lord *Coke*, treating of the difference between a power or an authority, and a right, and between powers and authorities themselves, as to the first, says, that if a man by his last will devise that his executors shall sell his land, and they release all their right and title in the land to the heir, this is void; for they have neither right nor title to the land, but only a bare authority. And so it is if *cestuy que use* had devised that his feoffees should have sold the land. And, as to the second, he says, that there is a diversity between such powers or authorities as are only to the use of a stranger, and not for the benefit of the releasor, and one that is for his benefit, as in these usual powers of revocation, when the feoffor &c, hath a power to alter, change, determine, or revoke, the uses intended for his benefit, he may release. And such power as this is instanced by Lord *Hale* in *Edwards v. Slater* (c), where he says powers to raise estates are either simply collateral, (as where a party who has such power has not, nor ever had, any estate in the land; as where such power is reserved

(a) 1 Co. 135. a.

(b) 1 Co. 173. 4.

(c) Hard. 415.

to a stranger; and there it cannot be destroyed by him, because it is no more than a *bare nomination*,) or not simply collateral. If the former were the case here, the words of the settlement may be fully satisfied without any estate being implied in the trustees, which can only be done from necessity, in order to satisfy and effectuate the settlement. But even supposing that after the revocation the legal estate were in the trustees, then it became the case of an infant trustee under the act, and all the formal requisites being complied with, the legal estate passed to the defendants' ancestor. And it is not necessary to consider now how far the Court of Chancery were imposed upon, or how far they may hold the defendants liable to the trusts under the deed of settlement; for all those considerations will be properly inquired into before that court, who will take care to give such effectual relief as may protect the interests of the children. It is enough upon the present occasion to say, that all the legal and formal steps directed to be taken by the statute were complied with. Again the same consequence follows if the infant be considered as a trustee at common law; for it was held in *Zouch d. Abbot v. Parsons* (a), that a conveyance by an infant is not absolutely void, but only voidable: and no act is here stated to have been done by him in order to avoid it; till which the legal estate is in the vendee. But even supposing this not to be the case either of an infant trustee under the statute of *Ann*, or of a trustee at common law, and that the legal estate remained in the trustees, still the lessor of the plaintiffs cannot recover, inasmuch as there is no demise on the record from the infant trustee, and this is not such a case of a *plain* equity as will enable the *cestuy que trust* to recover in ejectment.

Lord KENYON, Ch. J. The principal question in this case is, whether the remainders to the children of *Robert* and *Bethia Willis* were vested or contingent; if the latter, it cannot be disputed but that the destruction of the particular estate, on which they depended, before they became vested, would destroy them. One argument which has been used is, that the estate limited to the trustees was an use executed in them, for that otherwise the estate limited to the wife for her sole and separate use would not be secured to her, but would be under the husband's control. But, in answer to that, it is sufficient to observe that it is limited to the trustees, without saying "to and to the use of the trustees." If none of the limitations of the settlement could possibly take effect without this construction, I should be in-

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*There, for Lord
Longborough
in 2. Ves. Jun. 709.
suggests, that
there was an open-
ing for holding
the fine as void,
in respect of its
being part of
the fraud.*

(a) 3 Burr. 1794.

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clined so to decide it; as was done some years ago in a case in the House of Lords. But that is not the case here; for this estate was limited to *Bethia Willis* and to her heirs *until* the marriage should be solemnized; it was therefore intended that the legal estate should not be taken out of her unless the marriage took effect. Besides the Court of Chancery would consider the husband, if it vested in him, a trustee for the wife, so that she might have all the benefit intended by the marriage settlement. If the remainders to the children of *R.* and *B. Willis* were contingent, the objection made by the defendants, that the conveyance by *Willis* and his wife and the fine, by destroying the particular estate before they vested, also destroyed those remainders, must prevail; for it is too late, as the law now stands, to say that such is not the established doctrine of contingent remainders. This doctrine indeed involves in it difficulties which have been frequently felt by wise and able lawyers, who have wished to break through the rule: but they have been deterred from the attempt by a consideration of the consequences that might possibly ensue. There are two instances, it is true, where the law is otherwise; in equitable estates, where the contingent remainders are not destroyed, because the estate is vested in trustees to preserve the contingent remainders; and in copyholds, where the estate in the lord of the manor will support all the remainders: but in the case of freehold estates of inheritance, the rule is so established that it is not now to be shaken. On the first question in this case our judgment must depend on the authorities cited; the three leading of which are *Lovie's case*, *Walpole v. Lord Conway*, and *Cunningham v. Moody*. Of the first, inserted in *Rolle's Abridgment*, which was published under the inspection of Sir *M. Hale*, it is sufficient to say, that it was held in a case circumstanced like the present, that the remainder was contingent. This was also adopted in a great measure by Lord *Hardwicke*, in *Walpole v. Lord Conway*. But I am happy to find that, in the last of those cases, *Cunningham v. Moody*, where the same point arose, and where Lord *Hardwicke* had an opportunity of re-considering this question more fully and at a time of life when his judgment was more mature, that great judge determined differently. And I cannot find any *substantial* distinction between that case and the present. There Lord *Hardwicke* (after saying that the fee was not in abeyance) added, "nor does the power of appointment make any alteration therein; for the only effect thereof is that the fee which was vested was thereby
" subject

"subject to be divested if the whole were appointed." Now in this case the limitations to the children were first subject to a power of appointment, but for want of such appointment to the children *in fee*; (I say in fee, as I shall shew in the course of my opinion.) And whether the limitations precede or follow the power of appointment, it makes no difference. The object of the parties here was to make the whole estate subject to the power and will of the parents according to the situation and exigencies of the family. I therefore say, in the words of Lord *Hardwicke* in *Cunningham v. Moody*, that the fee was vested in the children, subject however to be divested by the execution of the power of appointment. The opinion of Lord *Hardwicke* in the latter case is peculiarly deserving of attention, because when it was discussed the former one of *Walpole v. Lord Conway*, where he had intimated a different opinion, was strongly pressed upon him, and because too he decided the last case at a time when he had the assistance of some of the most eminent lawyers who ever attended the bar of that court. I cannot therefore forbear thinking that, on the authority of that case, we ought to decide that the remainders to the children were vested, subject nevertheless to be divested by the parents executing the power of appointment. No appointment has been made; and therefore at the time when the acts stated in the verdict were done by the parents in opposition to the interests of their children, the limitations to the children were not destroyed. This decision puts an end to this cause as far as respects all the children but one: but it has been contended that they only took estates for life, and that, one being since dead, the reversion in fee of the parents immediately came into possession. And that brings me to the next question, whether the children took estates for life or in fee, which arises on these words; "and for want of such appointment, then to the use of all and every the child or children, equally, share and share alike, to hold the same, if more than one, as tenants in common, and not as joint-tenants, and if but one child, then to such only child, his, or her, heirs, or assigns for ever." And the question is, whether the words "his or her heirs" may not with propriety, and ought not, considering the whole settlement and the manifest intention of the parties, to act as words of limitation on all the preceding words in the sentence; I cannot bring myself to doubt but that they may. By putting the stops, or using the parenthesis, as pointed out by the plaintiff's counsel, it becomes perfectly clear. And we know that no stops are ever

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in 2. Ver. Decr 1763.
See however Lord
Loughborough's
opinion in Lord
Loughborough's
case. But see Mr.
Hearne's Conting.
Rem. 226.
is 233. of Mr. But
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inserted in acts of parliament, or in deeds; but the courts of law, in construing them, must read them with such stops as will give effect to the whole: If then we use the points suggested by the counsel, the clause will read thus "to the use of all and every the child or children, equally, share and share alike, his or her heirs or assigns for ever." If this had been like the case of *Hay v. Lord Coventry* (a), we might have lamented that the parties had not inserted words of inheritance to carry their probable intent into execution, but we could not have supplied them. But in this case there are words of inheritance; and I think we should defeat the manifest intention of the parties, and the object of the settlement, which was to give the children estates of inheritance, were we not to read this part of it in the manner contended for by the plaintiff's counsel.

Then it has been argued that the rights of the children, whatever they were, were subject to the power of revocation by the parents; and that the deed of revocation, standing *per se*, and taken separately from the conveyance to *Martin*, defeated their rights: but I am most clearly of opinion, taking the whole of the power together, that that deed was no legal revocation. They had only a power to revoke *on condition* of re-investing the money in the purchase of another estate for the benefit of their children. And it would be strange to say that any interval might happen between the sale and purchase of that other estate; it was all to be considered as one deed and one act. And though the purchase-money need not have been re-invested immediately, yet it was to lie in the hands of the trustees in the mean time until a proper opportunity should offer of so re-investing it. But it is said that the transaction as far as *Martin* was concerned was fair and honourable, and that the fraud only consists in the misapplication of the purchase-money: but, without imputing any fraud to *Martin*, and indeed it is negatived by the verdict, the maxim, that the principal is civilly responsible for the acts of his agent, universally prevails both in courts of law and equity; and therefore, whatever misconduct and fraud are imputed to *Cruttenden* by the verdict, it must affect his principal, *Martin*. Now the conduct of *Cruttenden* in this transaction is too infamous to be stated. Nothing can be clearer than that this was not a case within the statute of *Anne*. At present we are not called upon to decide what was the effect of what was done by the Lord Chancellor, or how far we sitting in a court of law can investigate what was

*See the opinion of
W. Benth at the
end of Mr. Hilliard's
ed. of Popham's Reports.*

*See my opinion
on case 11. Feb.
1807. B. M.*

*Quare, Martin
being acquitted by
of all fraud by the
verdict.*

(a) *Ante* 3 vol. 83.

done there; for this case does not depend upon that inquiry; the subsequent proceedings put it out of all doubt. We must remember that the power of revocation was restrained *so as* that the purchase-money should be paid into the hands of the trustees, (*and not into the hands of R. and B. Willis,*) and by them laid out and invested in the purchase of other freehold estates; the whole therefore was considered as one transaction. Now, in order to comply with this requisition, that was done in point of form, but not in substance; for it is expressly stated in the verdict that the draft was delivered by *Cruttenden for form's sake* to R. and M. Willis, and by them to R. Willis the infant trustee, *for form's sake*, and then taken from him, who ought to have applied it, and put into the hands of that very person of whom the settlors were jealous, and to whom they had expressly directed that it should not be paid; and in truth it never was applied to the purposes of the settlement. This then was a gross rank fraud, which contaminates the whole transaction, and renders it absolutely void, as well in a court of law as in a court of equity. Therefore the lessors of the plaintiff are entitled to recover to the full extent.

ASHHURST, J. The general question on the whole of this case is, whether the persons conveying had a right to convey the estate in question; for if not, however fair the transaction may have been on the part of the purchaser, the defendants cannot retain, but the legal title must prevail, without considering the hardship of their case. In order to determine this, the first consideration is, whether the lessors of the plaintiff had a *vested* interest, and what was the *quantum* of that interest; and, secondly, whether any acts have been done to divest them of that interest. As to the first, I am of opinion that the limitations to the children were *vested*. The authorities on this point cannot indeed be reconciled: *L. Lovie's* case is rather against this opinion; but the latest authority, that of *Cunningham v. Moody*, which appears to have been very well considered by Lord Hardwicke, seems decisive. The facts in that case do not *materially* differ from those in the present; and the *principle* of it is immediately applicable. Then the limitations to the children became vested on their birth, subject however to be divested by the appointment. As to the quantum of estate which those children took; I think they took *a fee*; for it is doing no great violence to the construction of the limitation to them to say, that the words "his or her heirs, or assigns, for ever" apply to the words in the former branch of the clause, by leaving the intervening words

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words in a parenthesis. With respect to the second question, whether their interests were divested by the acts stated in the verdict; that could only be done by a *due execution* of the power of revocation; a bad execution has no operation whatever. Now I consider this power not an *absolute* but a *conditional* one; for it is *so as* that the purchase-money be paid into the hands of the trustees, and not into the hands of *R. and B. Willis, and* be laid out in the purchase of other lands. Two conditions were therefore annexed to the execution of the power; the one that the money be paid into the hands of the trustees, the other that it be laid out in the purchase of other lands and settled to the same uses. Now neither of those has been complied with; and consequently the deed of revocation is a mere nullity, and does not divest the estates limited to the children. If we were to enter into the question of fraud; to be sure a more gross and infamous fraud never appeared on the records of the Court than that which was practised by the agent of the purchaser, and for which the principal is responsible: but the determination of the two first points renders this enquiry unnecessary.

BULLER, J. This case has been so fully discussed both on the bench and at the bar, that I will content myself with stating the general grounds of my opinion. On the question relative to the power of revocation, little remains to be said: that the revocation was fraudulent is clear for the reasons given by my Lord. It was the object of the settlors to settle the money, arising from the sale of the estate, on other estates to the same uses, if it could be done with advantage. The power of revocation was *conditional* only; the money was to be paid into the hands of the trustees on condition and for the express purpose of thus settling it: but, that condition not having been complied with, the deed of revocation is void.

With respect to the first and principal question; the argument on the part of the defendants, as far as authorities are concerned, rests on *L. Lovie's* case, and on that of *Walpole v. Lord Conway*. But what was said by Lord Coke in the former case certainly did not apply to the point before the Court; the question there arose on the will only; and nothing was said either in argument or by any other of the judges on the construction of the deed. The same case is also reported in *Moor* 772; where it appears that the remainder under the will was contingent, because it could not arise unless the eldest son died without issue, *and* there was *also* an alienation. Therefore I think it did
not

not occur to Lord *Coke* that a remainder, when once vested, could be afterwards divested by the execution of the power. If there were no authority against this case, I could not have made up my mind to agree to it: but his opinion has been since controverted in other cases. In 2 Lord *Raym.* 1150. Mr. J. *Powell*, speaking of *L. Lovies's* case, said "Though it was a doubt in *L. Lovies's* case, whether a remainder could be limited after a contingent fee, yet it is none now. And therefore if a fee-simple be limited to such persons as *A.* shall appoint by his will, remainder over, that is a good remainder vested till the appointment." Now the instance there put is directly this case; and if the limitations to the children were vested on the birth of a son, nothing has since happened to divest them. The defendants' counsel have rather hinted at, than insisted on, a difference between this case and that put by one of the plaintiff's counsel, of a remainder to the first and other sons of *A.* with a remainder to the first and other sons of *B.* his brother, where, on the birth of *B.'s* son before *A.* had any son, the remainder would vest in the former, subject to be divested on the birth of a son of *A.*: but I see no distinction; for when a child of *Robert* and *Bethia Willis* was born, the limitation was vested in him exactly in the same manner as if the limitation had been to their first and other sons. If there had been no power of appointment, the limitation to the children would have vested on the birth of a child: that was the point decided in *Lewis Bowles's* case. Then suppose the limitation to the children had been followed by a proviso containing a power of appointment, that would not have varied the case: if so, what difference is there, either in reason or in law, whether the power of appointment be inserted in one part of the instrument or the other? The Court must consider the *whole deed* together in order to collect the intention of the parties. As to the quantum of interest which the children took, that question also seems equally clear. Suppose the limitation were to "all and every the children, and *his* or *her* heirs and assigns for ever;" that would not be grammatically written, but, the intention of the parties being manifest, the Court must read it thus, *his, her, or their* heirs and assigns for ever. This question arises on a family settlement, which was made for the benefit of all the children of the marriage; and in order to give effect to the intention of the parties, we may leave the intervening words in a parenthesis, by which

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means the word "heirs" will have relation to the words in the former part of the sentence.

GROSE, J. If my brother *Buller* found the case so much exhausted as to make it unnecessary for him to go fully into every part of it, much less necessary is it for me to do so. The first considerable question is, whether the remainder to the children, which was certainly contingent in its creation, did or did not become vested in the children as they came *in esse*. I confess I was at first forcibly struck with *L. Lowie's* case, and *Walpole v. Lord Conway*, as also with the common definition of a contingent remainder. But I think that the rule laid down in *Cunningham v. Moody* is the best and wisest construction; and there the rule is "that a remainder may vest, liable to be divested by the execution of a power of appointment." The ground of it is, that the courts will never suffer the fee to be in abeyance but from necessity. And I am the more inclined to adopt this rule, as being the most likely to give effect to the intention of the parties; which the contrary doctrine would probably defeat. Therefore I think that on the birth of the children the limitations to them became vested: and as to the quantum of estate which they took, I have not a particle of doubt. By reading the words in the mode adopted by the Court, all the difficulty is removed. With respect to the execution of the power of revocation; I cannot read it without seeing what was the plain intention of the parties to the settlement. It was to enable the husband and wife to revoke the former uses, and the trustees to sell the estate, *so as* that the money should be paid to the trustees, and be by them applied in the purchase of other estates to the same uses. This then I consider only a *partial power* of revocation, which was given to them only for the purpose of effectuating the other part of the power, that of investing the money in other lands more beneficially for the children; and the whole must be taken together. It is admitted that some part of the transaction was fraudulent: but it is argued that the different parts of the transaction may be considered separately from the rest, and that the fraud consists, not in the revocation but, in the subsequent misapplication of the money. But I think that the fraud was in the conveyance, which was made with an intent not to apply the money as directed by the settlement, but to pay it into *Willis's* hands. This was merely a conditional power, which must be considered altogether;

together; and no part of the execution of it can be good, unless the whole be so.

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Judgment for the plaintiff.

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The KING *against* The Inhabitants of YARPOLE.

Saturday,
Nov. 20th.

TWO justices removed a pauper from *Leominster* to *Yarpole*, who appealed to the Sessions, at which fifteen magistrates were present; eight of them were for confirming, seven for quashing, it: but it was objected that, as three of those eight were rated at *Leominster*, they were interested and ought not to vote; they however persisted, and the order was confirmed, subject to the opinion of this court, on a case reserving that question. The orders having been removed here by *certiorari*, a rule was obtained on a former day to shew cause why the original order of two justices, and also the order of Sessions confirming it, should not be quashed.

On an appeal to the sessions against an order of removal, those justices, who are rated to the relief of the poor in either of the contending parishes, cannot vote.

Bearcroft now admitted that the order of Sessions could not be supported (a); on which

Erskine desired that the rule might be made absolute. But

Lord KENYON, Ch. J. said that could not be done, as no judgment for quashing the original order was entered on the rolls of the sessions. If the court of sessions had quashed, instead of confirming, the original order, there could have been no difficulty now. But the parties cannot come here *per saltum*; and, as no judgment for quashing the order of justices was given at the sessions, we, as a court of error, cannot do what the court below should have done. We must make that part of the rule absolute, which has for its object the quashing of the order of sessions, and direct the justices below to enter a continuance to the next sessions (which appears to be necessary from a case in 2 Str.(b),) when they may decide it. And

The Court ordered this accordingly.

(a) *Vide* 16 Geo. 2. c. 18. s. 4.

the case alluded; to 2 Str. 1263.

(b) *Qu.* If the case of *R. v. Polstead* were

HOBSON *against* TODD.

Saturday,
Nov. 20th.

THIS was an action on the case by one commoner against another for surcharging the common. At the trial at the last *Durham Assizes* before *Thomson*, Baron, the plaintiff

One commoner, who has surcharged, may nevertheless maintain an

action against another for surcharging

proved

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proved the fact of the defendant's having furcharged: but it appearing that the plaintiff had also furcharged to a greater amount than the defendant, the plaintiff was nonsuited.

On a former day in this term a rule was obtained to shew cause why the non-suit should not be set aside, and a new trial granted, because one tort could not be set-off against another; against which

Cockell Serjt., and *S. Heywood*, now shewed cause. This being an action on the case, the plaintiff must prove that he sustained actual damage; *per De Grey*, Ch. J. in *Wells v. Watling* (a). The gist of this action is the injurious consequence to the plaintiff, by the defendant's furcharging the common: like an action on the case for diverting a watercourse; but here the evidence negatived any idea of damage to the plaintiff, as it appeared that he had derived even a greater benefit from the common than he was entitled to, by depasturing a greater number of cattle than that allowed him. And therefore this is not like the case of *Wells v. Watling*, for there it appeared that the plaintiff had not put any cattle at all on the common, which he was probably prevented doing by the common being already furcharged: and in that case *Blackstone*, J. hinted that a small injury would not give a ground of action, but that it must be an exorbitant surcharge. And in *Marys's* case (b) Lord Coke said "The lord of the soil may maintain an action for trespass done in a waste or common, as an immediate trespass to him, be it greater or less; but the commoner shall not have an action but by consequence, namely if the trespass be such *per quod proficuum communie sue &c. amisit*, or that he could not have his common in so beneficial a manner as he had before". The same doctrine is also laid down in *Crogate v. Morris* (c); where it was said "if the commoner may have his common, although another take away part of my common, yet no action lieth". The same principle was recognized in *Woolton v. Sabter* (d); where it is said, that a commoner without a particular damage could not distrain the beasts of a stranger any more than bring an action upon the case". That this plaintiff cannot maintain his action also appears from considering the nature of the old remedy, in the room of which this action on the case was introduced, as was stated by Lord Ch. J. *De Grey* in *Atkinson v. Teasdale* (e). Formerly the commoner, who was aggrieved, sued out a writ of admeasurement of pasture, and by that suit all

(a) 2 Bl. Rep. 1234.

(b) 9 Rep. 113.

(c) 1 Brownl. 197.

(d) 3 Lev. 134.

(e) 3 Wils. 282.

the commoners, including the plaintiff himself, were admeasured. It appears therefore from the nature of that suit that the plaintiff, who had enjoyed a greater portion of common than he was entitled to, could have no cause of action; and this action upon the case, which was introduced as a more easy and speedy remedy to the plaintiff, cannot give him greater privileges than the old remedy.

Law, Chambre, and Park, in support of the rule, were stopped by the Court.

BULLER, J. (a) It does not seem to me that the plaintiff has sustained any very serious injury: but the question here is whether or not the plaintiff be entitled to a verdict; the question relating to the damages is for the consideration of the jury. It has been said by one of the counsel that the plaintiff must prove a *serious injury*, relying on the words of Mr. J. *Blackstone* in the case cited. But the expression used by that judge does not warrant such a construction; for it must be taken with a reference to the case then before him, in which the plaintiff did not appear to have been much injured, for it did not appear that he was possessed of a single beast which he could have put on the common. I lay therefore that part of the argument out of the question; for a *small injury* is so indefinite in its nature, that it affords no rule by which the mind can be guided. The only question then is whether *any* injury has been done by the defendant to the plaintiff. If the defendant had turned the supernumerary cattle on the common by the license of the lord, I admit that the plaintiff could not have maintained this action, because the defendant would not have been a wrong-doer: but here he is a wrong-doer, and the plaintiff is entitled to an action without proving any specific damage. This depends on the form of the declaration, and on what has been considered as proof of it. The allegation is that the plaintiff could not by reason of the defendant's act enjoy his common in so ample and beneficial a manner as he used to do: now if the defendant's supernumerary cattle had not been on the common, the plaintiff's cattle might have eaten every blade of grass which was consumed by the defendant's; that therefore is an injury to the plaintiff. There is also another ground on which this action may be supported, which is, that the *right* has been injured: and if a commoner cannot bring such an action as this because his cattle had grass enough to prevent them from

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starving, he must permit a wrong-doer, like the defendant, to gain a right by the length of possession. This opinion is fortified by what fell from Lord Ch. J. *De Grey*, in the passage alluded to, who said that this action was introduced in lieu of the old writ of admeasurement of pasture. By that mode of proceeding, if the defendant put more cattle on the common than he ought, the plaintiff was entitled to have a certain quantity admeasured to the defendant; the *excess* then is the injury in these cases. And the plaintiff having also surcharged makes no difference in this action; for one *tort* cannot be set off against another. Here the plaintiff has proved the whole of his declaration, by proving his right to the common, and that the defendant put on it more cattle than he had a right to do; and whether the plaintiff exceeded his right or not makes no part of the issue which the jury were to try. The issue is whether the defendant has been guilty of any wrong; and whether the plaintiff has been injured by it in the smallest degree and I am clearly of opinion that he has.

GROSE, J. I am not inclined to encourage this action on any other ground than that mentioned by my brother *Buller*, namely, that if *A.* infringe the right of common of *B.*, it is necessary that *B.* should have *A.*'s right ascertained; otherwise his wrongful act would in process of time become evidence of his right. If we were not to set aside this nonsuit, it would be holding forth this doctrine to the Public; that if one commoner, who happened to surcharge in a small degree, were injured in his right of common, he could not maintain an action against another who surcharged to a much greater degree: but that might be productive of the most mischievous consequences to all those persons who have rights of common. But my opinion is that it is no objection to a commoner bringing such an action as this that he himself has surcharged the common; though each person ought to recover damages in proportion to the injury which he receives. In practice I never recollect it being made a matter of enquiry, as an objection to the action, whether or not the plaintiff himself had surcharged; which I take for granted was because such an enquiry was immaterial. If this plaintiff has surcharged, he is liable to an action by any other commoner; but that is no objection to his suing the defendant, who is a wrong-doer; and it does not estop the plaintiff from shewing that he is injured. Therefore I am of opinion that the rule for setting aside the non-suit, and for granting a new trial, should

should be made absolute; though it is for the plaintiff's consideration whether or not it be worth his while to proceed any further.

Rule absolute.

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DERISLEY and Another *against* CUSTANCE.

Saturday,
Nov. 20th.

THIS was an action on a covenant in a lease for quiet enjoyment; and the declaration, after stating that the defendant's ancestors granted the lease in question, alleged that *the reversion came to and vested in the defendant by assignment thereof*. The defendant pleaded by his guardian that the reversion did not come to and vest in him *modo et formâ*, as stated in the declaration. On the trial at the last assizes at *Norwich* before Lord *Loughborough* it appeared that the estate *descended* to the defendant, an infant, as heir at law to the lessors, his father and grandfather; that a person had been employed by the defendant's mother to receive the rents of the estate, which he had accordingly done, expressing in his receipts that *he received the rents for the defendant as landlord*; and that the mother herself had received one year's rent, and had given a receipt for the same to the plaintiffs *as tenants to her son*, mentioning that *it was received for her son's use*. On this evidence it was objected, first, that the receipt of rent was the act of the defendant's mother, and could not prove a possession in the infant, to subject him to an action of covenant; Secondly, that the evidence shewed that the reversion vested in him by *descent*, and not by *assignment*; and, had the declaration charged defendant as heir, the parole would have demurred. And the learned judge, being of opinion with the defendant on both objections, nonsuited the plaintiffs. A rule having been obtained to shew cause why the non-suit should not be set aside,

In covenant (which runs with the land) evidence that the defendant is in as heir will support a declaration charging him as assignee. An infant cannot pray the parole to demur in any other stage of the proceeding than at the time of pleading.

Le Blanc, Serj^t. and *Joddrell*, shewed cause; insisting on the first point that there was no proof of possession in the infant, so as to charge him with this covenant, which run with the land: for if the receipts were to be admitted as evidence against him, that would be to charge him with the acts of other persons, over whom he had no control. There was no proof of any acquiescence on the part of the infant himself, or even of any person having authority to bind him: all acts of ownership were proved to have been done by the mother herself, or by her direction, without any evidence of her being his guardian. And there-

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fore even if an allegation that the defendant were *assignee* of the reversion could be supported by shewing that it came to him by *descent*, still it was necessary, in order to charge him as such, to prove that he was in possession. But, Secondly, the plaintiff precluded himself by the form of his declaration from giving evidence that the defendant was in by *descent*; for had the action been brought against him as *heir*, he might have prayed the *parol* to demur till he came of full age, in order that he might have an opportunity of electing whether he would take the estate subject to the incumbrances or not. But if the plaintiff can be permitted to give the heirship in evidence on this action, wherein he only charges the defendant as assignee, he will be enabled to do that indirectly which he could not do directly; and deprive the defendant of a privilege to which by law he is entitled, namely, that of suspending the proceedings till his full age.

J. Adair, Wood, and Wilson, contra. First, no other sort of evidence can be given of the possession of an infant than that which was produced in the present case. He must from the necessity of the thing act in general through the agency of others. But at all events this evidence was sufficient against him to be left to the jury, there being no contradiction to it whatever. Secondly, it was not necessary to state precisely the manner in which the defendant derived title to the premises. The plaintiffs cannot be supposed to be cognizant of his estate. It is a general rule that, in pleading title in a defendant, general words are sufficient, where the certainty lies within the defendant's own knowledge. *Com. Dig. tit. Pleader, c. 26. Coates v. Wade, 1 Lev. 190. Rider v. Smith, ante 3 vol. 766.* Therefore it was sufficient for the plaintiffs to state generally that the estate came to the defendant by *assignment*; and that allegation was supported by shewing that the defendant by any means had such an estate upon which the covenant would attach. It has been held that a devisee is an assignee in law. *2 Show. 57.* Even an executor may be charged as assignee in respect of his possession, and yet such an objection as the present might equally be made in that case; for it might be said that if he were sued as executor, it would be competent for him to plead no assets. But still he would be liable to be charged in respect of his possession. So here, an action might indeed have been brought against the defendant as heir, but the plaintiffs were not bound to sue him as such: for if a party take possession of an estate, and enter
into

into the receipt of the rents and profits, he becomes an *assignee* in law, and liable to be charged as such in respect of all covenants which run with the land. At all events, if the defendant wished to avail himself of his infancy, he should have pleaded it; and by not so doing, he has waved his advantage. His appearing by guardian was not sufficient; for he was not bound to avail himself of his infancy, and he might not choose so to do.

ASHHURST, J. (a) As the plaintiffs cannot be supposed to be cognisant of the defendant's title, it was sufficient for them to allege in their declaration that he was *the assignee*, without shewing *quo jure* he was such; it is the common mode of pleading. Then the question is, whether the circumstance of the defendant's being an infant will vary this case; in this stage of the cause I think it does not. This being an action of covenant, it was not competent to the defendant to plead his infancy *in bar* to the action; if he had wished to avail himself of his infancy, he should have pleaded that the estate did not come to him by assignment, but as heir at law, and have prayed the parol to demur: but he has waved that advantage; the infancy was not pleaded, and it was insisted on at the trial as a ground of non-suit; but that cannot be supported.

BULLER, J. The difficulty at the trial seems to have arisen from the defendant's counsel having recourse to a nicety of law, which is not frequently heard of in modern practice, and which the other side were not prepared to answer: but no authority has been cited to shew that the question of parol demurrer can arise at *Nisi Prius*. Now it is clear that the defendant's infancy in this case is not a matter of bar to the action; and the infancy was not put in issue; it formed no part of the issue on this record. Then it is strange to say that a fact, which in itself is not a bar to the action, and which is not put in issue at all, shall be permitted to avail the defendant at the trial on an issue in which he has joined, so as to form the ground of a non-suit. If the defendant had intended to take advantage of his infancy, he should have done it before he pleaded; for it is a dilatory plea, and does not go to the merits; it only suspends the proceedings. I see no objection to the plea suggested by my brother *Ashhurst*, supposing the defendant could have taken advantage of his heirship on this declaration, which charges him as assignee: He might have pleaded that the estate came to him as heir at law, and that he was an infant, traversing that it came to him by

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assignment: that would indeed be tendering an issue in the words of the declaration on the inducement, but which might be material on a different ground; if therefore the plaintiff with that inducement would have joined issue on that fact, it would have become material to enquire whether or not the defendant were an infant: but as the record now stands, it is perfectly indifferent whether the defendant be an infant or an adult. Then the question is, whether, as between adults, there be any objection arising from the evidence to this declaration against the defendant, charging him as *assignee*, when in fact he was *heir*. It is sufficient to prove *the substance of the issue*, which is in this case that the defendant is clothed with such a character as will make him liable on the covenant; and that was sufficiently proved by shewing that the estate was vested in him. For whether he were in possession as assignee, or heir at law, he was equally liable on this covenant; and liable on the general allegation of his being assignee.

GROSE, J. The only question on this record was, whether or not the premises came to the defendant by assignment; the objection was that they descended to him as heir; now if he were the heir at law, and entered into the premises, he was such an assignee as makes him liable in this action.

Rule absolute.

Tuesday,
Nov. 23d.

BAGSHAW against BOSSLEY, Clerk.

A bond, given by an incumbent to the patron, on presentation, to reside on the living, or to resign if he did not return to it after notice, and also not to commit waste &c, on the parsonage house, is good. In such a case a license to the incumbent to absent himself from the living may be revoked.

DEBT on bond by the surviving obligee. The defendant, after craving oyer of the bond and condition, (reciting that *W. Bagshaw* and *J. Bagshaw* were entitled to the nomination of a curate, to serve the curacy of the Free Chapel of *Wormbill*, in the county of *Derby*, then become vacant by the death of the Rev. *John Goddard*, clerk, late curate there; and that *W.* and *J. Bagshaw* had nominated and appointed the said *George Bossley* to supply the said vacancy, and to be curate of the said chapel, in order for him the said *G. Bossley* to be licensed thereto by the proper ordinary; and that *G. Bossley* had agreed to be constantly and duly resident at the curacy-house there, in and upon the said curacy, and in default of such residence had also agreed to resign and deliver up the said curacy and chapel of *Wormbill* into the hands of the proper ordinary, within one month next after the request of the said *W.* and *J. Bagshaw*, or either of

of them &c, or within one month next after notice in writing given to him, or left for him for that purpose at the curacy-house, by the said *W.* and *J. Bagshaw*, &c, so that the said curacy and chapel might become vacant, and the said *W.* and *J. Bagshaw* &c, patrons of the said chapel might present thereto anew,) which declared that if the obligor did and should, in default of such constant and due residence in and upon the curacy-house &c, within one month next after the request of the said obligees, or either of them &c, or within one month next after notice in writing given to him, or left for him, for that purpose at the curacy-house, by the obligees, &c, absolutely resign and deliver up the said curacy, &c, into the hands of the proper ordinary or guardian of the spiritualties for the time being absolutely to accept of such resignation of the said curacy, &c, whereby the said curacy and chapel of *Wormbill* might become vacant, and the obligees, &c, patrons of the said chapel might present a-new to the said curacy and chapel, discharged of all charges and incumbrances, done or suffered by the obligor; and if the obligor did not or should not commit or suffer any waste or dilapidations upon the houses, lands, &c, belonging to the said curacy, during the time he should be so curate of the said curacy or chapel; the obligation should be void, &c; Plead- ed, First, That he had resided at the curacy-house, &c; and that he had not committed or suffered waste, &c. And Secondly, That after his appointment to the curacy, he had a general license from the obligees to reside elsewhere, &c. Replication, First, That the defendant voluntarily absented himself from the 7th *April* 1790 to the 8th *April* following, and that the plaintiff gave him notice to resign within one month, so that he as patron might present a-new, &c, which he had refused to do, &c. And Secondly, That after the time when the supposed license was granted, namely, on the 7th *April* 1790, the plaintiff countermanded and revoked the said license &c, that the defendant absented himself &c, and that the plaintiff gave notice to &c, (as in the former.) To both these there was a general demurrer, and joinder.

Sutton, in support of the demurrer, contended, first, that the bond itself was illegal and void; secondly, that the license given to reside elsewhere than on the curacy, being general, could not be revoked. First, The bond is illegal, because it placed the incumbent under the undue control of the patron after the presentation, and after the relation between them had ceased, and a new relation had sprung up between the

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the incumbent and the ordinary, to whom only he owed obedience. The right of presentation in the patron is a *public trust*, and not a mere *private interest*. The duties of the incumbent are prescribed by the municipal law and the canons and ordinances of the church; and therefore it was not competent to the patron to impose any private conditions of his own creating, beyond those which the civil and ecclesiastical law have deemed it necessary to require. If such a bond taken on a presentation to a parochial living be illegal, this must be equally so; for there is no difference between a free chapel and a parochial living as to this matter: the only difference is that the latter is subject to the visitation of the ordinary, and the former to the visitation of the chancellor in right of the crown. The *jus patronatus* is in both cases the same; both of them consisting in a right to nominate and present a fit person on the happening of a vacancy, after which the right of patronage is *functus officio* till another vacancy happens, and a new relation arises between the incumbent and the visitor. But this is an attempt to continue the control of the patron over the incumbent after the legal relation between them ceased; a control not recognized by law, and which is calculated to make that, which is an office for life, depend upon other conditions than those which by law are imposed; and consequently it would depreciate the value of the living. With respect to the residence required by the bond, that is carried much further than the law requires it; for the stat. of *Hen. 8.* (a) only imposes certain penalties much inferior to that imposed by this bond for non-residence. And besides there may be various defences to an action on that statute, as, amongst others, residence on another living by dispensation; whereas there can be no excuse under this bond, unless the license of the patron be such; and further in this case the living itself is to become vacant. Again too in this case the penalty is to become due to the patron in case of dilapidations in which he has no sort of interest, that being the sole concern of the successor. The effect therefore of this bond is to raise to the patron a special interest in the execution of a public trust, which by law he was not invested with. It is true indeed that it has been thrown out by the Judges in several old cases that such a bond as this would be good, but it was only said *arguendo*; and those authorities have been since considerably shaken by the determination of the House of Lords in the case of the Bishop of *London v. Ffytche* (b); wherein it was held that a general resignation bond from the

(a) 21 *Hen. 8.* c. 13.(b) *Dom. Proc.* May 1783.

incumbent to the patron was void. The Lord Chancellor there delivered his opinion that all bonds of this nature were void, and that a presentation or collation ought to be without any condition whatever. And though most of the judges were of a different opinion in that case, yet they grounded their opinion more upon *precedent* than upon *principle*; and one of them said that had it been *res integra* he should have been of a different opinion. Now as there can be no doubt but that on principle bonds of this description are very impolitic, and as there have been different determinations upon the subject, the judges ought rather to determine according to reason and sound policy, with which the last precedent agrees. Secondly, The license to be absent, mentioned in the pleadings, being general and indefinite, and not qualified in point of time or any other circumstance, entirely destroyed the penalty, which being once gone cannot be set up again by a revocation of the license, according to the doctrine in *Dumper v. Syme* (a); where it was held, on a proviso in a lease that a lessee and his assigns should not alien without license, that, if the lessor once gave a license for that purpose, it was not to be considered as a mere dispensation for one alienation, but the condition was thereby entirely destroyed. And this is not like the case of a special license for a particular purpose, as to go over a man's own grounds, or for a particular time, which may be revoked at the pleasure of the party granting it. But even if this license could be revoked, *non constat* that it was so; for it is only stated on the record that there was a *notice of revocation*; and nothing should be presumed in aid of a forfeiture.

Chambre, contra, was stopped by the Court.

LORD KENYON, Ch. J. I cannot bring myself to entertain a doubt on this case. It has been argued that the patron's right of presentation is a mere trust; it is so to some purposes, but not to all. It is a trust coupled with an interest; for it is a subject of conveyance for a valuable consideration, which is not the case with a naked trust. As soon as the defendant was presented to the living, he was bound to take upon himself all the duties of an incumbent; to reside on the living, to take upon him the cure of souls, and to keep the house in proper repair. Now this bond was only entered into for the purpose of securing a performance of all those duties, which by law, and without the bond, he was bound to discharge. I avoid saying any thing respecting the case of the Bishop of London v. *Ffytche*: when that

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question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary. It is sufficient for me, in deciding the present case, to say that it cannot be governed by that. For here the plaintiff does not call for the resignation of the incumbent, but merely for a performance of those duties which in morality, religion, and law, he ought to do. I am therefore clearly of opinion that a bond for the performance of these duties is not illegal. With respect to the second question: it cannot be disputed but that, in general, the same person, who gives, may revoke, a license. In the case cited indeed where the lessor had given his tenant license to assign, such license could not in its nature be revoked: but, in a case like the present, while the license continues to exist and to have operation, it may be revoked; and in this respect this is like a general license to enter another's grounds, which may be revoked at any time at the pleasure of the party who granted it.

(a) BULLER, J. I cannot find any immorality or illegality in this bond. It is the duty of an incumbent to reside on his living, and to be regular in the discharge of his duty. Now this bond requires nothing more; it only requires him to do what the law would have compelled him to do without it. As to the other point; the case cited from *Cro. Eliz.* does not apply to the present. There the license to assign having been once given, there was an end of the proviso: but here the condition is not that the defendant shall not be absent without consent, but that he shall not be absent, and if he be and do not return after a month's notice, that he shall resign. Then the consent to be absent for a time does not vary the case; for the defendant was bound to return after a month's notice.

GROSE, J. declared himself of the same opinion.

Judgment for the plaintiff.

(a) *Aspburst*, J. absent.

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DOE on the several Demises of BLANDFORD, and
Wife, and ELIAS DYMCK, *against* APPLIN.

Under a devise to "A. for life, and after his decease to and amongst his issue, and in default of issue," then over, A. takes an estate tail. In order to give effect to the deviser's general intent, a court will overlook a particular intent inconsistent therewith.

ON the trial of this ejectment, a verdict was taken for the plaintiff, subject to the opinion of this Court on the following case.

A. Dymock,

A. Dymock, being seised in fee of the premises in question, by will dated 29th August 1758 devised, as follows; "I give and bequeath unto my nephew *William Dymock* all that my freehold estate that I bought of Mr. *Kingstone* situate at *Albampton* in the county aforesaid, to hold to him during his natural life, and after his decease to and amongst his issue, and in default of issue to be divided between my nephew *Elias Dymock*, and my niece *Mary Dymock*, and to their heirs and assigns for ever." *A. Dymock* the deviser died in 1758; whereupon *William* the nephew entered into the premises, and in *Michaelmas* Term 1759 suffered a recovery thereof. In 1761 *William* married *Mary Baker*, by whom he had one child only, named *Ann*, who survived her father, and died an infant in June 1770. *William* died the 2d of September 1769, having devised the premises to his wife, under whom the defendant claims. *Elias Dymock*, one of the lessors of the plaintiff, is the *Elias* mentioned in the will of *A. Dymock*. *Mary Blandford*, the other lessor of the plaintiff, is the daughter of *Thomas Dymock*, the elder brother of *William*, and as such heir at law of *A. Dymock* the deviser and of *Ann* the infant daughter of *William*, and also heir at law of *Mary Dymock* the niece of *Abraham*, mentioned in his will, which *Mary* survived *William*, and died unmarried, and intestate.

Lens, for the plaintiff, said that two questions arose; first, what estate *William Dymock* took under the will of *A. Dymock*, whether for life, or in tail; Secondly, what estate his children would have taken, whether in tail or in fee; for if the former, *Elias* and *Mary Dymock*, the devisees, took vested remainders in fee after that estate-tail; if the latter, one of the lessors of the plaintiff is entitled as the heir at law. And he contended that *William Dymock* took an estate for life only, and his child an estate-tail. It must be admitted, on the authority of *King v. Melling* (a), and other cases, that *William Dymock* would have taken an estate-tail, had the devise not been qualified by the words "to and amongst his issue;" but those words distinguish the present from former cases where the devisee has taken an estate-tail. The word "amongst" necessarily implies division, and makes it necessary for all the children to take as purchasers. Under the words "to and amongst" it has been repeatedly held that each child must take some substantial part, and not nominally only; as in *Alexander v. Alexander* (b), and other cases (c); they have the same

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(a) 1 Vent. 225. 2 Lev. 59.

(b) 2 Vez. 640.

(c) 1 Vern. 66. 1 Bro. Cb. Cas. 450.

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meaning as "to all and every." In *Goodright v. Dunham* (a), where the devise was to J. L. for his life, and after his death, unto all and every his children equally, and to their heirs, and in case he dies without issue, then over; the question was as to the interest which the children took. Lord Mansfield said "neither side thought it could be maintained that Jeffery took an estate tail." It is no objection to this mode of construction that it gives a different sense to the word "issue" in different parts of the will, and that "issue" in the first part means "children," and in the second "heirs of the body"; because "issue" may be a word of limitation or of purchase in different wills; and there does not seem to be any reason why it should not receive different interpretations in different parts of one will. The same objection (if it were any) would equally prevail in those cases where the party under the word "heirs of the body" takes an estate as a purchaser, and yet takes it with a descendible quality to his issue; as in *Archer's case* (b), where, under a devise to R. Archer for life, and afterwards to the next heir male of Robert, and to the heirs male of the body of such heir male, the remainder to the right heir male of Robert was good; the words heir male, being used as *designatio personæ* in the first instance, and as words of limitation in the other. So in *John de Mandeville's case* (c); "J. de Mandeville by his wife Roberge had issue Robert and Mawde; R. de Morevill gave lands to Roberge and to the heirs of J. Mandeville her late husband on her body begotten." It was held that Roberge had an estate but for life, and that the fee-tail vested in Robert, heirs of the body of his father being a good name of purchase. So also in *Doe v. Fonnereau*. Dougl. 470. The consequence of W. Dymock's taking an estate for life only, and his child an estate-tail, is that the ultimate remainder was vested in E. and M. Dymock, according to the distinction in the fifth resolution in *Loddington v. Kime* (d), that where the mesne estates limited are for life or in tail, the last remainder may, if it be to a person in *esse*, vest, but that no remainder limited after a limitation in fee can be vested. Here, therefore, the first remainder being less than a fee, there still remained something to limit, which, when limited to a person in *esse*, vested. But, if William's children would have taken a fee, then the recovery suffered by William barred the subsequent remainders according to the last resolution in *Loddington v. Kime*. And the heir at law of the devisor is let in. Now Mary, one of the lessors of

(a) Dougl. 251.

(b) 1 Rep. 66.

(c) Co. Lit. 26. b.

(d) Salk. 224.

the plaintiff is the heir at law, and 20 years (a) have not elapsed since *William's* death.

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Gibbs, contra. It is admitted that *W. Dymock* would have taken an estate-tail, had not the words "and amongst" been prefixed to "issue." But those words will not vary the case; for they may be construed to mean to and amongst the issue of *William* in such proportions as the law directs in the case of descents of estates-tail, namely, if one son only, to him; if more, that the first son should take the whole in *præsenti*, but, expectant on that son leaving no issue, that the second should take; if several daughters, that they should take the whole in *præsenti*. This mode of construction will satisfy the word "amongst;" and this seems to be the true signification of the words objected to, when coupled with all the other words of the devise. It has been argued that *William* took only an estate for life, and his children an estate-tail; to support which it was said that two different significations might be given to the word "issue" in the same will: but the case of *Goodright v. Dunham* (b) gives a decisive answer to that argument; for Lord *Mansfield* there said, "the word "heirs" in the limitation over to "the daughters certainly does not mean "heirs of the body," and "we cannot give the same words two different senses in different "parts of the same will." So also in *Cook v. Cook* (c), the Lord Keeper put this case; "A devise to the issue of *B.*, and for want "of such issue to *C.*; *B.* having a son and daughter, they shall "take only as persons described, and have only an estate for "life; although the subsequent words "for want of such issue" "seem to imply an estate-tail: but then there must be a double "use made of the word "issue," viz. first, it is a word of im- "plication, who were the persons to take; Secondly, as words "of limitation to make an entail, which is not to be admitted." And this objection does not occur in *Archer's* case, or in that of *John de Mandeville*; for there the first taker took an estate-tail, as being the first person answering that description; and the estate afterwards descended to those answering the same description. This is not like the cases cited, where under the words "to and amongst" the Court of Chancery has held that each child must have something; for in those there was nothing to rebut the *primâ facie* intention of the testator: but those words may be restrained by the accompanying words; and in this

(a) The declaration was of *Trinity Term*
29 G. 3.

(b) *Dougl.* 255.

(c) 2 *Vera.* 546.

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case the words which follow shew that the devisor intended that they should be taken in a qualified sense. The words "to and amongst his issue" cannot be assimilated to "all and every the children", to which they have been compared; for "issue" is a much stronger word to create an estate-tail than "children". Then it was argued upon a supposition that the children of *William* took a fee, in which case it was said that the heir at law would be let in: but, admitting that to be the case, the consequence suggested would not follow, that the heir at law would be now let in; for more than twenty years have elapsed since the recovery. But there are no words of inheritance added to the devise to the children: the word "estate", as here used, is not sufficient to carry the fee, for it is used as the local description of the estate, and not as denoting the interest which he meant to devise in that estate; it is "my freehold estate that I bought of Mr. *Kingstone*, situate at *Alhampton* in the county aforesaid". There is nothing therefore in this devise to shew that the devisor intended that the children should take a fee, but a contrary intent may be collected from other parts of the will; for, in devising the ultimate remainder, he said "to *E. and M. Dymock*, and to their heirs, and assigns for ever;" which manifestly shews that the devisor knew the necessity of adding words of inheritance when he intended to give the fee. This ground was much relied on in *Chester v. Painter* (a).

Lens in reply. No authority has been cited to shew that the word "amongst" has ever received the construction contended for by the defendant. Nor is it ever used in such a sense; for it necessarily implies division; whereas the defendant's argument shews that the devisor meant, when he used the word, that the estate should first go to one, and then to another in succession. And so much have the Courts thought themselves bound by the words "to and amongst", that, even where they have been followed by others "in such shares and proportions" as the settlors chose, it has been held that some substantial part of the estate must be appointed to each. What was said by the Lord Keeper in the case of *Cook v. Cook* was not necessary for the decision of the case before him; it was merely an hypothetical case: but here two different senses may be given to the same words in different parts of the will, in order to effectuate the intention of the devisor. In answer to the objection that the word "estate" does

(a) 2 P. Wms. 333.

not carry a fee to the children, because it is described as being situate *at Albampton*; though formerly a distinction prevailed between a description of an estate *at* or *in* such a place, yet now they both have the same meaning; besides this is described as a freehold estate, which necessarily includes the interest which the deviser had.

Lord KENYON, Ch. J. Although this will is very inaccurately drawn, I think we may collect the deviser's general intention from the words of it. The great question in this case is what estate *W. Dymock* took under the will. In the first clause the estate is expressed to be given only during his natural life, but in the next limitation it is to go *to his issue*, and in default of issue only was it to go over; it is clear therefore from the whole of the will that the deviser did not intend that it should go over to those in remainder until after a general failure of issue in *W. Dymock*. Now I think we are warranted by many determinations, and particularly by that of *Robinson v. Robinson* (a), to give that effect to the will which will best answer the deviser's general intention, though by so doing we may defeat some particular intent. Here the general intent was that *W. Dymock* and his issue should take first; then what construction will best effectuate that intention. It has been argued by the plaintiff's counsel that *W. Dymock* took only an estate for life, and his children an estate tail: but it would be difficult to put two different interpretations on the word issue; and, even if that could be done, it would not further the intention of the deviser in this case; for there are no cross remainders to the children, and they can never be implied; so that, according to the construction contended for, if one of the children died, his share would go over to those in remainder, in prejudice of those children who survived, which was certainly not intended by the deviser. Therefore we shall best answer his general intent by saying that *W. Dymock* took an estate-tail; and, in so determining, we shall not go farther than has been done in other cases; especially in *Robinson v. Robinson*, where the estate was expressly given to *L. Robinson* for life and no longer, and after his decease to such son as he should have, taking the name of *Robinson*, and for default of such issue then over: there, notwithstanding the deviser said in express terms that *L. Hicks* should only take for life and no longer, this Court were of opinion that, in order to effectuate the manifest general intention of the deviser, he must by ne-

(a) 1 Burr. 58.

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cessary implication take an estate tail. It is not necessary to go through all the cases on this subject, which are for the most part collected in *Robinson v. Robinson*; in addition to which is *Dubber v. Trollop*, 8 Vin. Abr. 233; but the result from them all is, that the Court is to put such a construction on the whole of the will as will best effectuate the general intention of the devisor, contrary to *one* of the limitations, if a different construction will defeat the general intent. Then according to that principle I think that in this case *W. Dymock* took an estate-tail; and consequently that the remainders were barred by the recovery.

(a) BULLER, J. I am not inclined to differ from my Lord in the construction which he has put upon this will, though I think by so doing we shall go farther than has ever been done in any of the former cases; because, in order thus to construe the will, we must reject the words "and amongst". But if we were to give effect to those words, it would defeat the general intent of the will, which will be better effected by giving an estate tail to *W. Dymock*. For the devisor certainly intended to prefer all the issue of *W. Dymock* before the more distant branches of the family, which would not be the case, as there are no cross remainders, unless *W. Dymock* took an estate tail. The word "issue" may mean *children*, or *heirs of the body*: but it is too much to say that it means children in this will, for then grand-children would be excluded, and the next clause "in default of issue" could not have any effect at all. It therefore must mean "heirs of the body." Therefore I think that, as by rejecting the words "and amongst" the general intent of the devisor will be best effectuated, we are warranted in rejecting them.

GROSE, J. Upon the mere words I should think that *W. Dymock* took only an estate for life; and yet if we were to put that construction on the will, it would defeat the general intention of the devisor, which can only be carried into effect by considering "issue" as a word of limitation. There is no case in which "issue" has been determined to be a word of purchase, unless coupled with other words expressing such an intent; but here the contrary intent appears. Mr. J. Rainsford, in *Finch* 282. arguing upon the distinction between *issue* and *children*, said "the word *issue* is, *ex vi termini, nomen collectivum*, and takes in "all issues to the utmost extent of the family, as far as the "words *heirs of the body* would do;" and he observed that it was resolved in *Wild's* case, 6 Rep. 17. "that a devise being to the

(a) Mr. Justice Ashurst was absent.

"father

“ father and mother, and after their deaths *to the children*, the word “children” shall be a name of *purchase*, and not of *limitation*, “ and they shall have but an estate for life: but had it been to “ their *issues*, (as in the case then before him) that word *issues* “ would have been construed a word of *limitation*, and not of “ *purchase*; and so it was lately resolved in the Exchequer “ Chamber; and a judgment given in the King’s Bench to the “ contrary was reversed upon the authority of *Wild’s* case.” That case is strong to shew that *issue* is a word of limitation and not of purchase, and that it is different from children. And as the deviser’s intent in this case will be best effectuated by determining that *W. Dymock* took an estate tail, that is the best and most legal construction of this will.

Postea to the defendant.

DOE on the Demise of BEEZLEY *against* WOODHOUSE
and Others.

Tuesday,
Nov. 23d.

ON the trial of this ejectment a special verdict was found, in substance as follows; *Thomas Heys*, being seised in fee of certain copyhold premises according to the custom of the manor, which he surrendered to the use of his will, and also of freehold and leasehold estates, by will, dated 17th Jan. 1764, devised as follows; I will that my debts and funeral expences be paid out of my *whole estate* by my executors. And whereas I am now possessed of one half of a leasehold estate lying and being in *Kirkdale*, held by lease under the Right Honourable *Edward* Earl of *Derby* for three lives, one whereof is now in being, the same together with all my other *real estate* I give, devise, and bequeath, unto my loving wife *Catherine Heys* during her natural life; and likewise I give unto my loving wife *Catherine Heys* all my *personalty* during her natural life; and I further likewise give her a power of disposing and giving either by will, or otherwise, all my linen &c, [enumerating certain articles of furniture]; and all the remainder of my goods and furniture I give to be sold by my executors, and the money arising from the sale thereof I give to be divided amongst my nephews and nieces hereafter named, share and share a-like (that is to say) [naming them].

A. devised his real and personal estates to his wife for life, and directed part of the personalty to be sold after his wife’s death by the executor, and divided between *C. D. E. F.* and *G.*; he then gave two annuities to *H.* and *I.* to be paid by his executors out of his *whole estate*, and to commence after his wife’s death; and he then devised “ the remainder of the profits, after his wife’s death and after the yearly payments to the

annuitants, out of his *whole estate*, to *B. C.* and *D.*, equally, share and share alike”; held that the executor took a fee.

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against
WOODHOUSE.

I give unto my brother *William Heys* 40*l.* yearly, to be paid him by four quarterly payments, during his natural life, by my executors hereafter named, out of my whole estate. I give unto my cousin *John Heys* 6*l.* yearly to be paid him by four quarterly payments during his natural life by my executors hereafter named, out of my whole estate; the aforesaid dividend of the money arising from the sale of my goods, and the yearly payments out of my estates, to my brother *William Heys* and to my cousin *John Heys*, are not to commence till after the death of my loving wife *Catherine Heys*. The remainder of the profits, after the death of my loving wife *Catherine Heys*, after the yearly payments made to my brother *William Heys*, and my cousin *John Heys*, out of my WHOLE estate, I give to be divided amongst *Thomas Heys*, *George Heys*, and *Jane Heys*, sons and daughter of *W. Heys*, equally, share and share alike. He then gave several pecuniary legacies, and (among them) one of 10*l.* to his niece *N. Beexley*. *Catherine Heys*, the widow, entered on the devisor's death, and afterwards died in 1785. *George Heys*, the eldest brother of *Thomas Heys* the devisor, died in the life-time of *Thomas Heys* and before the making of the will, without male issue, leaving *Ann Beexley* the lessor of the plaintiff, and who is described by the name of *Nancy Beexley*, his only legitimate daughter, and heiress at law, and who is also the heiress at law of *Thomas Heys* the devisor. *Ann Beexley* before the death of the devisor intermarried with *Thomas Beexley*, who died before this ejectment was brought. *Ann Beexley*, after the death of *Catherine Heys*, entered into and was seised of the premises. *William Heys* the brother, and *John Heys* the cousin of the devisor, died after the devisor, and in the life-time of *Catherine* his widow; *William Heys* having had issue *Thomas Heys*, *George Heys*, and *Jane Heys*, the devisees mentioned in the will of *Thomas Heys*, who also survived the devisor, but died in the life time of *Catherine* his widow. The defendant, *Catherine Heys*, is the heiress at law of *Thomas* and *George Heys*, sons of *William Heys*, and nephew of the devisor; and the defendant *John Woodhouse* is the heir at law of *Jane Heys* daughter of *William Heys*, and the niece of the devisor. The defendant, *Catherine Heys*, and *John Woodhouse*, were on the 25th January 1787 admitted tenants to the copyhold estates according to the custom of the manor; and after the death of *Catherine Heys*, the devisor's widow entered into the premises in question. The verdict also stated that the personal estate of *Thomas Heys*, the testator, of which he died possessed,

over and above the amount of his debts and the legacies bequeathed by his will, amounted to 2000*l*.

J. Heywood, for the plaintiff, (after observing that, as the lessor claimed as heir at law, he could not be disinherited but by express words or necessary implication) contended, first, that the words "whole estate" in this will meant *personal* estate only, and could not be extended to the *real* estate; because in all the instances, (except one) in which it is used, they are coupled with a direction to the *executors* to pay. In *Shaw v. Bull* (a) this bequest "all the *overplus of my estate* to be at my wife's disposal, and make her *my executrix*" did not pass a freehold house which was not particularly specified in the will: there *Powell, J.* mentioned this case "I give all to my mother", which it was contended might include whatever he had to give, either chattel or inheritance, yet, because it might be all *personal*, or all real or inheritance, it was taken to be too loose and general to disinherit an heir at law; and therefore no land passed by it: and he referred to a strong case on this head in *Noy* 48. In the same case *Trevor Ch. J.* (b) said "if the words be indifferent to real and personal estate, or may be applied to personal alone, there the heir at law is not to be disinherited by the implication of such words, or by any implication at all but what is a necessary one. In *Piggot v. Penrice* (c), where the testatrix devised thus, "I make my niece G. executrix of all my goods, lands, and chattels," and died, not having any leasehold interest, it was held that lands of inheritance did not pass by those words. The defendants must claim under the general residuary clause, in which the testator gave the *remainder of the profits* out of his *whole* estate, after his wife's death and the yearly payments to his brother, to his nephews and niece. But as the words "whole estate" in every other part of the will must be taken to refer to the *personal* estate only, so also must they in this, unless different meanings be given to the same words in different parts of the same will. And though, if the personal estate had not been sufficient to satisfy the yearly payments, the real estate might have been liable, yet it is sufficient to observe that it is found as a fact in the verdict that there was a surplus of 2000*l*. of the personal estate, after payment of the debts and legacies. But, secondly, if the words "whole estate" must necessarily be construed to extend to *real* property, and that the executors took an estate by implication to enable them to re-

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(a) 12 Mod. 592.

(b) 12 Mod. 596.

(c) *Proc. in Chanc.* 471.

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ceive the rents and to pay the annuitants, still the executors only took an estate during the lives of those annuitants; and the devise in favor of the defendants of *the remainder of the profits* cannot be extended beyond that time; after the determination of which the heir at law is entitled, there being no disposition of the ultimate remainder. There are no words of inheritance to pass the fee to the persons under whom the defendants claim, neither is there any general sweeping clause, or any introduction declaring the deviser's intent to dispose of his whole property. The case of *Peiton v. Banks* (a) was a stronger one than the present; there lands were given to *A.* for life, with the reversion to *B.* and *C.* to be equally divided between them; and yet it was held that *B.* and *C.* took as tenants in common for life only. Neither does it make any difference in this case that a small legacy is given to the heir at law. *Roe d. Callow v. Bolton*, 2 Bl. Rep. 1045; and *Right d. Mitchell v. Sidebotham*, Dougl. 730.

Chambre, contra, was stopped by the Court.

LORD KENYON, Ch. J. In the beginning of the will the deviser, after reciting what estates he had, devised all his real estate and also all his personalty to his wife for life: then he considered how his personalty should go afterwards, and he accordingly bequeathed it to his executors to be divided among his nephews and nieces share and share alike. This therefore was a disposition of the whole of one branch of his property. But, there being other persons for whom he meant to provide, he proceeded to give annuities to them payable out of his whole estate, directing that "the aforesaid dividend of the money arising from the sale of his goods, *and the yearly payments out of his estate* [to those annuitants] should not commence until the death of his wife": and then he devised "The remainder of the *profits*, after his wife's death, *after the yearly payments*, [to the annuitants] *out of his whole estate*, to be divided among two nephews and a niece, share and share alike." Now if the goods and furniture had exhausted all the personal estate, the annuitants might have resorted to the profits of the real estate. And this construction is supported by the terms "*yearly payments*", which are more applicable to real than to personal property; for if money be out on interest the dividends are said in the law to arise from day to day. Then as these annuitants were to take a beneficial interest out of the real estate, and the payments were to be made

(a) 1 Vern. 65.

by the executors, the latter must of necessity take a fee, in order to answer the charges made upon them, as has been determined in a variety of cases; for if the executors were to take an estate for life only, the annuitants might have survived them. How far the whole of this property is exhausted by these means it is not necessary for us to decide here: it is sufficient for the determination of this case that there is an outstanding term in the executors; if there be any resulting trust for the heir at law, he must apply to the Court of Chancery. But it is clear that in this case the whole estate necessarily vested in the executors by way of an use executed, because that which they were required to do could not be answered by a less quantum of estate.

ASHHURST, J. was of the same opinion.

BULLER, J. The words "whole estate" occur several times in this will, and in all the places in which they are used they mean *all the property* which the deviser had. In the first place the debts are to be paid out of his *whole estate*, which must charge the real as well as the personal estate. Then, after giving the residue of his personalty, he gave specific annuities, which are to be paid out of his *whole estate*; these therefore must be paid out of his *real* estate. Now if we once know the meaning of the words "whole estate" as used by the deviser, there is an end of the question. And if by "whole estate" the deviser meant his *real* estate, the devise of *the remainder of the profits out of his whole estate* must pass the fee. The case cited from *Douglas* is against the plaintiff: for there Lord *Mansfield* said that a devise of "all my estate" will pass an estate of inheritance; but as that was only a devise of "all the deviser's lands lying in such a place", it was not sufficient. But here "estate" is used, which in its natural import will carry a fee-simple, unless there be words to control it; and as there are no words in this will to that effect, the executors must take a fee.

GROSE, J. In order to give effect to the deviser's intention, it is necessary that the executors should have the absolute power over the whole of his real estate.

Judgment for the defendant.

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Tuesday,
Nov. 23d.

The bankruptcy of the lessee is no bar to an action of covenant brought against him.

AURIOL *against* MILLS. In Error.

COVENANT in the Common Pleas for rent; pleas, *non est factum*; *riens arrere*; and the bankruptcy of the plaintiff, in error, before the rent became due; in which plea it was stated that the commissioners assigned the lease, in which the covenant was inserted, to the assignees for the residue of the term, and that by virtue of such assignment all the estate, interest, and term of years then to come &c, of the plaintiff in error in the lease was and still is vested in the assignees. To the latter plea there was a general demurrer and joinder; and after two arguments in the court of Common Pleas, judgment was given for the plaintiff below (a). The record having been removed into this Court by writ of error,

Park, for the plaintiff in error, contended that the bankrupt was discharged from his covenant to pay rent by the assignment of all his property by the commissioners. The cases principally relied on in the Court of Common Pleas, 1 *Sid.* 401, 447. 1 *Saund.* 240. *Cro. Jac.* 309. 521. *Cro. Car.* 188. 580. and *Cas. temp. Hardw.* 343, only prove that the lessee cannot *by his own act* discharge himself from his express covenant, and are therefore not applicable to the present case, because here the bankrupt does not endeavour by his own act to discharge himself, but the estate, in respect of which he entered into the covenant, is taken from him by law. Now the general principle of law, which holds a party liable on his express covenants, although the estate in respect of which it was entered into is gone, is founded on the presumption that the party voluntarily and by his own act assigned over the estate to a person in whom he has confidence, and against whom he has a counter-remedy if he himself be sued by the lessor. But here is no privity of contract between the bankrupt and the assignee under the commission; and therefore the reason for upholding the privity of contract between the bankrupt and his lessor falls to the ground, especially too as the bankrupt could maintain no action against the lessor on any of his covenants. A party, who enters into a covenant, is only liable in two respects; either in respect of the estate which he enjoys, or on his personal contract. But in this case the first is assigned over, and is taken from the lessee by act of law, by a

(a) *Vid. H. Bl. Rep. C. B.* 433.

compulsory

compulsory power which he cannot resist: and, as to the other, the law has taken away the means by which he was enabled to perform the contract. And he cannot remain liable on the covenant for himself *and his assigns*, for that means *voluntary assigns*: but here it appears by the record that the estate is vested in the assignees under the commission, who are not (legally speaking) the assignees of the bankrupt but of the creditors or commissioners; the bankrupt himself does not even assign in point of fact, he is no party to the deed of assignment. It was contended in the court of Common Pleas that a bankrupt remains liable on his express covenants because there are no express words in the statutes concerning bankrupts to discharge them: but they are by no means necessary; for in *Brewster v. Kitchall* (a) Holt, Ch. J. said "If *H.* covenant to do a thing which is lawful, and "an act of parliament come in and *hinder* him from doing it, "the covenant is repealed"; for which was cited *Dy. 27. pl. 278.* In this case the bankrupt is *disabled* from performing the covenant, which is the same thing. And the rule of law applies, *lex non cogit ad impossibilia.* A bankrupt is discharged by the bankrupt laws from such obligations as arise in respect of any property vested in the assignees by virtue of those statutes. In *Mayor v. Stewart* (b) Yates, J. said "as the act divests him of his "whole estate, and renders him absolutely incapable of performing the covenant, it would be a hardship upon him if he "should remain still liable to it, when he is disabled by the act "of parliament from performing it". And the Court (though they held that the party was liable in that case, which was on a collateral covenant,) nearly adopted the language of Mr. J. Yates. In *Cantrel v. Graham* (c) that point was determined; and the authority of that case as well as the opinion of Yates, J. were afterwards expressly recognized by this Court in *Wadham v. Marlowe* (d), in which Lord Mansfield, after noticing those cases, and speaking of the effect of the assignment of the commissioners of bankrupts, concluded thus, "It was argued that if a man be divested by act of law without his own default, he is discharged: this is as strong; because though it were his own act originally, on which the assignment was founded, yet the immediate effect produced is by the act of parliament; *et, in jure, non remota sed proxima spectantur*". When this case was determined in the Common Pleas, it was thrown out by one

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(a) *Saik.* 198.(b) 4 *Burr.* 2443.(c) *Barnes* 69. 4to. edition.(d) *H. Bl. Rep.* 437. and *Cook's Bank. Laws* 518. 2d edit.

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of the judges that that maxim was not applicable to a case like this: but on examination it will be found to apply with peculiar force. The objection is that the bankrupt is divested of his estate by his own act: but, according to Lord Bacon's illustration of the rule (a), though the act of bankruptcy be the primary cause on which the bankrupt laws attach, yet the *immediate cause* of his being divested of his estate is the *assignment* by the commissioners, beyond which the Court are not to look. For he says "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree". And he puts this case "If an annuity be granted *pro consilio impenso et impendendo*, and the grantee commit treason whereby he is imprisoned, so that the grantor cannot have access to him for his counsel, nevertheless the annuity is not determined by this non-feasance; yet it was the grantee's act and default to commit the treason whereby the imprisonment grew: but the law looketh not so far, but excuseth him, because the not giving counsel was compulsory, and not voluntary, in regard of the imprisonment." Now that is a much stronger instance than the present; for that proceeded on the express crime of the grantee. With respect to the case of *Hornby v. Houlditch* (b), which was relied on in favour of the plaintiff below; it is to be observed in the first place that it does not appear by a M.S. note of that case, taken by Lee, Ch. J. that Lord Hardwicke concurred in opinion with the Court: and, even if he did, that case is clearly distinguishable from the present. The question there depended on an act of parliament, a bill of pains and penalties, which was passed on account of the crimes of the *South-Sea* directors; and even there the directors had a certain sum (and that too a considerable one) reserved to them for the payment of their private debts: but bankrupts are considered as unfortunate traders rather than as criminals; the allowance to them (when made) is very inconsiderable, and it is contingent whether or not they are to receive any allowance. Neither is this case like the one, to which it was compared below, of a common law execution, where it is said that the tenant, whose term is thus taken from him, is liable on his covenant; because there the privity of contract is not at an end; the lessee has his remedy over against the vendee of the sheriff: whereas in this case the

(a) *Bac. Law. Tr.* 35.(b) *Andr.* 40. and *ante* 1 vol. 93. n. a.

bankrupt has no control whatever over the assignees in whom the term is now vested. The argument *ab inconvenienti* may fairly be urged in construing the statutes relating to bankrupts: by determining that the bankrupt is discharged in this case, the lessor will not suffer, because he always has his remedy against the tenant in possession; whereas to hold that the bankrupt continues liable after his bankruptcy is to decide that he is bound by his covenant to pay rent for an estate, which is absolutely taken from him by the compulsory power of the law, and in the expectation of enjoying which only he entered into the covenant.

Bond, Serjt. contra. It appears from all the authorities on this subject that nothing can discharge a person from his express covenant but the express words of an act of parliament, or the release of the covenantee. The cases of *Wadham* and *Marlow*, and *Cantrel v. Graham*, are not applicable to the present; for they were both (a) actions of debt. That species of action is founded on the *possession* of the tenant; and when the lessor consents that the lessee shall assign to another person, the lessee is discharged. But this action is founded on the express *covenant* of the lessee; and the case of *Hornby v. Houlditch* clearly proves that he remains liable on that covenant, notwithstanding his bankruptcy. That was a kind of statute execution like the present; and Lord *Hardwicke*, in giving his opinion on the case, alluded to the instance of a bankrupt. From the reign of queen *Elizabeth*, when the first statute relating to bankrupts was passed, down to that of queen *Ann*, bankrupts continued liable for their debts contracted before their bankruptcy, and the dividends under the commissions were only considered as a payment *pro tanto*: the statute 4 *Ann* (the reasons for making which provision are stated by Lord *Hardwicke* in 1 *Atk.* 255. 6.) for the first time discharged them from their debts *in toto*; but that act only gives a discharge from *debts due at the time of the bankruptcy*. Now the demand made by the defendant in error in this case was not a debt due at the time of the bankruptcy, and therefore the plaintiff in error is not discharged from it. What fell from *Yates J.* in *Mayor v. Stewart* was merely an extrajudicial opinion, not necessary to be given on the case then before the Court; and it was only an observation on the

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(a) It does not appear clearly from the report of the case of *Cantrel v. Graham* whether it were an action of debt or covenant; though, from some expressions used by the Court in determining it, it rather appears to be the former.

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hardship of the case, without saying what the law was upon the subject. But if it be a case of hardship, it can only be remedied by the Legislature, and not by the courts of law. A statute execution is analogous, in this respect, to a common law execution; in that if a term be taken under a *fieri facias*, the lessee still continues liable on his covenant. So if a person be divested of all his property by attainder in felony, he is liable for his debts contracted before, though deprived by law of the means of paying them. *Cro. Eliz.* 516. There may possibly be some hardship on the lessee in particular cases: but it would also be extremely hard on the landlord, if he were deprived of his remedy on the covenant of the lessee; for though he may always bring an action of debt against the tenant in possession, yet the term may be assigned over to an insolvent, as was done in the case in 2 *Str.* 1221. It seems therefore in point of reason and justice, as well as of strict law, that the defendant in error is entitled to the judgment given in his favor by the Court of Common Pleas.

BULLER, J. observed that in arguing the case of *Wadham v. Marlowe* a case was cited from *Hob.* 82. and he asked the counsel whether that case affected the present: no answer being given,

The Court said it would be proper, before they gave judgment, to look into the cases that had been mentioned.

LORD KENYON, Ch. J. On the next day delivered the opinion of the Court.

It was not owing to any doubt that we entertained on this question that we did not pronounce judgment when the case was argued; but as a case was alluded to in *Hobart*, which was not argued upon at the bar, we wished to have an opportunity of examining that case before we gave our opinion. But on looking into it, we think that it does not press upon the present case; and we are all of opinion (in which Mr Justice Buller, who is now absent, concurs) that the judgment of the Court of Common Pleas must be affirmed. It is extremely clear that a person, who enters into an express covenant in a lease, continues liable on his covenant, notwithstanding the lease be assigned over. The distinction between the actions of debt and covenant, which was taken in early times, is equally clear: if the lessee assign over the lease, and the lessor accept the assignee as his lessee, either tacitly or expressly, it appears by the authorities that an action of debt will not lie against the original lessee; but all those cases with one voice declare that, if there be an *express covenant*, the obligation on such covenant still continues. And this is found-
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ed not on precedents only, but on reason; for when a landlord grants a lease, he selects his tenant; he trusts to the skill and responsibility of that tenant; and it cannot be endured that he should afterwards be deprived of his action on the covenant to which he trusted by an act to which he cannot object, as in the case of an execution. In such a case the lessor has no choice of the under-tenant: So here the assignees are bound to sell the term, and perhaps they may assign to a person in whom the lessor has no confidence.

Then it remains to be considered whether any exception to that general rule has taken place in the case of a bankruptcy. It seemed admitted in the argument, and indeed it cannot be disputed, that, where a disposition of the lease has been made by virtue of a *fiery facias*, or an *elegit*, the lessee continues liable on his covenant, notwithstanding the estate be taken from him against his consent. On the same principle the *South-sea* Director was held liable, although he was divested of his property by the act of confiscation. So in the case of an attainder, and other cases, which it is not necessary to mention particularly, as they are all collected in the report of this case in the Common Pleas. Then what is there peculiar in the case of a bankrupt, which should differ it from those cases. No act of parliament has said that he shall be discharged from his covenants; neither is there any resolution in either of the courts of law to that effect: but on the contrary it has been uniformly determined in all the various cases on the subject that, for all contracts which are not to be performed till a period subsequent to the bankruptcy, the bankrupt shall still be liable, notwithstanding he is stripped of all his property; as in the case of *Goddard v. Vanderbeyden* (a), and many others. So in this case the defendant's liability to pay happened after the bankruptcy; and therefore, on the principle of those cases, he remains liable, notwithstanding the commission of bankrupt divested him of all his property; for a certificate would only have made him a new man from the time when the act of bankruptcy was committed. But instances have occurred where persons, who have been declared bankrupts, have been possessed of considerable property after paying all their debts; as in that of *Sir S. Evans*. Then in reason, why should a person not continue liable on his covenant, when his affairs are arranged. Then it was contended that the bankruptcy put an end to the privity of contract: but that argument is not well founded; for it was asked by Lord *Hardwicke* in the

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(a) 3 *Wils.* 262.

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case of *Hornby v. Houlditch*, as it is reported in the Reports (a) of this Court, "what is there here to discharge the privity of contract or estate between the lessor and lessee? Or what is there to discharge an express covenant?" In the language of Lord *Hardwicke*, I may ask the same questions in this case. Has the landlord done any act to discharge the lessee? Even in cases where the landlord has expressly consented to receive the assignee as his tenant, the original lessee has always been held liable on his covenant; and those are, in my opinion, much stronger cases than the present, where the assignees are forced upon the landlord without his consent. This is like the case of an execution, and indeed in some of the books it is called a statute execution. In every view of the question, therefore, I am clearly of opinion that this case was properly decided in the Court of Common Pleas, and that that judgment ought to be affirmed.

Judgment affirmed.

(a) *Vid. ante*, 1 vol. 93. n. a.

Wednesday,
Nov. 24th.

The KING *against* The Inhabitants of CLAYHYDON.

The servant a few days before the end of the year, for which he was hired, went away in order to get another place for the next year, without asking his master's consent: On his return before the end of the year, the master insisted on turning him away, and offered him his wages up to that time, which he accepted without making any objection; this was held to be a dissolution of the contract, and defeated the settlement, though the servant wished to stay out the year.

THE pauper, being settled at *Ufculm* by hiring and service, made a bargain with *W. Hodges* in *Dunkefwell* for a year, at the wages of 2 *l.* 15 *s.* 0., and served till nine days before the expiration of the year, when he went away on a *Sunday* morning, in order to get another place when his year should be up, without asking any leave of, or mentioning it to, his master; he returned on the *Tuesday* following about six o'clock in the morning, when he asked his master what work he should go about; the master told him he might go and serve the master he had worked for the day before. He saw his master about an hour afterwards, who then paid him his wages up to that time only. No conversation passed; he then went away, and did not afterwards return: *he wished to have stayed out the year, but his master would not let him.* The sessions on appeal quashed the order of justices, by which the pauper and his wife were removed from *Claybydon* to *Ufculm*, and stated the above case.

Morris, and *Fanshawe*, in support of the order of sessions. The pauper gained a settlement in *Dunkefwell*, notwithstanding the absence for the last nine days of the year, because it was a reasonable cause of absence; as much so as the absence on account of illness was held to be in *R. v. Madington* (a); or that in *R. v.*

(a) *Burr. S. C.* 675.

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Islip (a), where the servant went to hire himself to another master for the next year. The latter case indeed was a stronger one than the present; for there the servant absented himself against the express order of the master; and yet it was held that, as it was a reasonable request, which the master ought not to have refused, a settlement was gained notwithstanding the absence for those three or four days. If then the master in this case could not have refused, it would have been nugatory in the servant to have asked, his consent. The license to be absent for such a cause may be considered as a license given by the law. Then as this was a reasonable cause of absence, the master ought to have received the servant on his return; instead of which he discharged the servant contrary (as it appears by the case) to his will. For the acceptance of the wages by the servant did not amount to a consent on his part to dissolve the contract; neither does the deduction of part of the wages vary the case, as was held in *R. v. Islip*. A *constructive* service is sufficient to give a settlement: Here on the servant's return he tendered his service, which was refused by the master; now the tender by one and refusal by the other were equivalent to actual service. And if this will not give a settlement, it will be in the power of a master to defeat the settlement of a servant, by discharging him a few days before the end of the year.

Rook, Serjt. and *Clapp*, *contra*, insisted, 1st. that the contract between the master and servant was dissolved before the end of the year by the mutual consent of both parties; the consent of the former was manifested by his insisting on turning away the servant and paying him his wages; that on the part of the latter by accepting his wages. *R. v. Gresham*; *ante* 1 vol. 101; and *R. v. Grantham*; *ante* 3 vol. 754. It does not appear by the case that, when the master proposed to discharge the servant, the latter made any objection to the proposal: but, on the contrary, it is stated expressly that no conversation whatever passed at that time. It must therefore be taken to be a dissolution of the contract on the proposal of one party, acceded to by the other. The private *wishes* of the servant to serve the remainder of the year, not communicated to the master, cannot vary the case. But, Secondly, if the servant did not consent to put an end to the contract, the master was justified in discharging him. If a servant may leave his master for two days without leave, or without assigning any reason at the time, it may equally be extended to any length of time. On such an

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(a) *Str.* 423; and *Bott.* 301. pl. 561.

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absence, the master does not know whether or not the servant will ever return; he may therefore provide himself with another, and discharge the first on his return. In order to gain a settlement by hiring and service, there must either be an actual or constructive service during the whole year: but in this case the former is not pretended; and it cannot be said that the pauper was constructively in the service of his master, when he left the service before the expiration of the year without consent, and was not received again.

Lord KENYON, Ch. J. It is now too late to say that a *constructive service*, pursuant to a hiring for a year, will not confer a settlement on the servant: though I very much doubt whether a greater certainty on this subject would not have been attained by attending strictly to the words of the act of parliament; however, in order to preserve an uniformity of decisions, we must adopt the construction which has so frequently been put upon it. But I do not know that it has ever been decided that a settlement was obtained, *unless by construction the relation between master and servant continued during the whole year*. The cases of *R. v. Islip*, and *R. v. Maddington*, which have been relied on, do not govern the present. In the former, the servant did not return until after the expiration of the year; and the facts of that case left the question open whether or not the relation between the parties subsisted during the whole year: The Court there thought that the master improperly refused his consent, and that though the servant were not in the actual discharge of his duty in his master's house, yet, as he was liable to be called into the master's service during the remainder of the year, that he was constructively in that service down to the end of the year. But the present case differs from that, because during the continuance of the year a further act was done; when the servant returned after his absence, the master not only found fault with him, but refused to take him again into his service: it is true that the servant wished to continue, but both parties did that which put an end to the contract; the one paid, and the other received the wages. After that period the servant was no longer subject to the control of the master. In *R. v. Islip*, the servant was under the master's control during the whole year; he was liable to be called into the master's service whenever the master thought proper: but here the relation between the master and servant was rescinded before the end of the year by the act of both parties; then it is impossible to say that the pauper was

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constructively in the service after that time. So in the case of *R. v. Maddington*, though the servant left the service three weeks before the end of the year, and went to his friend, because he was not able to perform his service, yet there was no act done during the year to put an end to the contract: afterwards indeed when the master paid the servant his wages, he deducted a part of them; but he could not by an act *ex post facto* deprive the servant of the benefit to which he was before entitled. But the case of *R. v. Gresham* is extremely like the present; there the Court held that, by the act of accepting the wages, the servant agreed to put an end to the contract. I am therefore of opinion that there could be no *constructive* service in this case, when the parties themselves, by mutual consent, put an end to the relation of master and servant within the year.

ASHHURST, J. It is much to be lamented that the distinctions in these kind of cases have been so nice that it is difficult to discover the principles on which they have been decided. The question then is, what is the principle on which they have turned? I think that will be best supported in this case by determining that the service did not continue during the whole year. It is not now to be contended that an actual service is necessary; it must be admitted that a constructive one is sufficient. But this case is distinguishable from that of *R. v. Illip*; for here was a dissolution of the contract before the end of the year: on the servant's return, the master insisted on discharging him, and offered his wages; and though the servant *wished* to continue in the service, yet he at length consented to put an end to the contract, by taking up those wages. The acceptance of wages was a signifying of the consent on his part. And this brings it within the case of *R. v. Gresham*.

GROSE, J. (a) Though there has been some contrariety in the cases as to what shall be said to be a hiring for a year, yet it is clearly settled that, if during the year there be a dissolution of the contract, no settlement can be gained. Now on the facts of this case it is clear that the contract was dissolved before the end of the year. The master refused to receive the pauper into his service when he returned, to which the latter made no objection, but received his wages up to that day only. It is indeed stated afterwards, that the servant *wished* to have served out the remainder of the year, but that his master would not let him, yet it is clear that at the time when the wages were paid both par-

(a) Buller J. was absent.

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ties consented to put an end to the contract; for it is stated that no conversation passed at that time; and though the servant may have wished to stay till the end of the year, yet he did not communicate that wish to his master. And the other fact stated, namely, that he accepted a sum short of the whole year's wages, shews that it was understood by both that they intended to dissolve the contract. This case is distinguishable from those of *R. v. Islip*, and *R. v. Maddington*, for the reasons already given; and it is like that of *R. v. Gresham*.

Order of Sessions quashed.

Wednesday,
Nov. 24th.

A claim of toll to be taken in specie for goods sold in a market is supported by evidence of a right to toll for goods brought into the market and there sold; without shewing any right to toll for goods sold in the market without being brought there.

MOSELEY, Bart. against PIERSON.

THIS was an action on the case, which was tried before Thomson, B. at the last Lancaster Assizes. The first count of the declaration stated that the plaintiff on 1st March 1790, and long before, was and still is lawfully possessed of a market holden and to be holden in Manchester, on Saturday in every week throughout the year, except &c., for buying and selling flour and oatmeal, and other goods usually sold in markets; and by reason thereof the plaintiff of right ought to have a reasonable toll of all flour and oatmeal sold or exposed to be sold within the said town on any of such market-days, not being the flour or oatmeal of any person legally exempt from the payment of such toll, viz. one quart and one quarter of a quart of flour out of every twelve score pounds weight of flour, and a quart and a quarter of a quart of oatmeal out of every twelve score pounds weight sold or exposed to be sold within the same town on any of such market days, yet that the defendant on Saturday 3d April 1790, and on other Saturdays, wrongfully and injuriously sold divers large quantities of flour and oatmeal, and exposed to sale divers other large quantities on the same market days in a private, secret, and clandestine, manner, whereby the plaintiff was prevented taking his toll, and could not enjoy his said market and tolls as he ought to have done. The second count claimed toll of flour and oatmeal sold, &c. The other counts were to the like effect; none of them laying the claim of toll to arise from goods brought into the market, and there sold or exposed to sale.

On the part of the plaintiff it was proved that the defendant had sold oatmeal on market-days, in the town of Manchester, in an inclosed shed, at a public-house there; and that it was delivered at that place. Before the plaintiff's counsel had proceeded

Case of Manchester Market.

From the London Evening Post of 20. June
1782.

“Yesterday judgment was given in the court of King’s
“Bench in the important cause relative to the market at
“Warwick. The franchise of the market place belonged
“by an antient prescription to Sir John Mosely, & the
“several stalls have been accustomed to be rented of
“him. A person, who had no right nor interest in the
“market lately erected some stalls & sheds on his own
“freehold adjoining to the market without any real
“molestation to any of those before erected. Sir John
“Mosely brought an action as for a nuisance, in
“order to try his exclusive right to erect stalls for
“the vending goods wares & merchandize in that
“market. The court held, that the franchise of
“markets & of fairs, according to the common
“law ought not to be infringed by any persons
“erecting stalls for merchandize, even on their
“own freehold, without the consent of the legal
“proprietor of the market or fair.”

[See a further case about the same
market in 4. Term Rep. 104. viz.
the case of Mosely v. Pearson.]

See L. Raym.
49.

ceeded further in the case they were asked by the defendant's counsel, whether they could give any evidence of toll ever having been taken of flour or oatmeal *sold, which had not been brought into the market?* And it being admitted that they could not, it was insisted for the defendant that as the declaration was framed the plaintiff could not maintain this action; and the learned judge being of that opinion non-suited the plaintiff. A rule was granted this term to shew cause why the non-suit should not be set aside.

Chambre and *S. Heywood*, being now called upon to support their rule, admitted that there might be a sale in law without an actual delivery of the goods (speaking abstractedly of a sale,) but insisted that, in a proceeding like the present, where the parties were speaking of a *sale in a market*, a sale of goods there technically and necessarily implied that the goods were actually in the market. This appears from the language of ancient precedents; in some of which a claim is made of toll for *goods sold*, even where the *gravamen* is for not paying toll on goods brought into and sold in the market. In 7 *Hen. 4. fo. 44.* the plaintiff alleged that he was possessed of a fair and market, &c, and claimed toll of the buyers of beasts at the said fair and market; and then complained that the defendant bought 12 beasts, and drove them out of the market, without paying the toll. In 9 *H. 6. fo. 45.* the plaintiff claimed toll for every horse sold in the fair at *Smithfield*, (not for every horse brought there and sold;) and the injury there complained of was an assault on the plaintiff's servants, by which they were prevented taking toll for the horse there sold: it is observable that several objections were taken to the count, but not one of the kind now stated. Those cases proceeded on the supposition that there could be no custom to take toll for goods sold in the market, unless they were brought there: Such a custom would be void in law; and indeed the toll is to be taken in *specie*, which necessarily implies that the goods are brought into the market. In 11 *H. 6. fo. 19.* the right is claimed for a toll on the stalls on which the goods are sold; and the *gravamen* is in selling privately in the defendant's house, without alleging that the goods so sold were in the house. In *Brotenl. Red. 480, 1.* the claim of toll is for goods brought into the market and there sold; but the averment of the fact, under which the defendants justified, is only that the goods were sold in the market. In *Osbaston v. James, 2 Lutw. 1378.* the defendant claimed toll on sheep and lambs sold in the fair, without saying that they were

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brought into the fair. *Savory v. Smith*, 2 *Lutw.* 1144. S. P. The claim of toll in *Thomf. Ent.* 386. (a) is for all goods sold or brought to be sold. The case of a sale in *market overt*, as changing the property in the goods, also shews that this is the true meaning of an allegation of a sale of goods in a market; declarations and pleadings in the upper bench, 108; *Hern. Entr.* 252; and *Rob. Ent.* 30. In all which cases the change of property is insisted on by simply alleging a sale in a market-overt, without stating that the goods were there at the time of the sale; and yet in such cases the property cannot be altered, unless the goods be actually exposed to sale in the market.

Law, Wood, and Topping, contra. This being an action *stricti juris*, the plaintiff's claim must be laid and proved strictly. 2 *Saund.* 112; 2 *Lev.* 27; and *Hob.* 189. But here the plaintiff failed in proving a material allegation in his declaration. If the toll had been claimed on goods sold and exposed to be sold, the proof would have been sufficient. But here it was laid in the alternative, on goods sold or exposed to sale. It does not necessarily follow that the goods were actually in the market, because they were sold there. For if they were contracted for in the market place, they were absolutely sold, and the property altered. Goods are sold by sample in several markets in the kingdom; and if a claim of toll for goods thus contracted for can exist in law, the verdict in this case will hereafter be evidence of such an enlarged claim, to which the plaintiff admits he has no pretension. In *Carth.* 239, where the declaration for toll was conceived in general terms, and an exception was proved in a particular instance, it was held to be a fatal variance. The cases, which have been cited, will not be found on examination to prove the position for which they were quoted, namely, that a sale of goods in a market necessarily implies their being brought into the market. That in 11 *H. 6. fo.* 19. is explained in 8 *Rep.* 127. a; where it is expressly stated that the claim was on those who sold meat, or any other commodity, *which came to the said market.* The case in *Thomf. Entr.* is capable of a different interpretation from that which has been put upon it: it is stated thus "*quod officarius et assistentes sui &c. consueverunt capere ex quolibet modio grani per aliquam personam in burgo prædicto venditi vel vendendi inducti, vicesimam partem cujuslibet modii.*" Now *inducti*. not being either in the plural or the singular may

(a) Generally called *Liber Pletitandi*.

refer to both the antecedents (a), "*venditi*" as well as "*vendendi*." In the case in *Brownl. Red.* the claim was very extensive indeed, extending equally to all contracts of sale as well without as within the market: but it does not appear what became of it; whether or not there were a demurrer; it therefore only proves that such a plea was drawn. The case of *Osbaston v. James* (b) was determined on the ground of the plaintiff's being exempt from the payment of toll, and not on the validity of the claim set up by the defendants in their plea: it was therefore nugatory to consider whether or not the defendant's claim were well pleaded; because, admitting it to be so, the plaintiff was not liable to pay any toll.

Lord KENYON, Ch. J. There is no doubt on the law on this subject; for most unquestionably the plaintiff must prove his claim as it is laid in the declaration. But the only question is on the legal meaning of the word *fold*, as it is here used. There may indeed be a sale by sample in fraud of a market, but not *quà* sale in a market; for the expression "a sale in a market" imports that the goods sold are brought into the market and ready to be delivered to the purchaser. Now here the claim is of a toll in specie, which necessarily implies that the commodity, in respect of which the toll arises, is brought into the market. The precedents cited by the plaintiff's counsel weigh stronger with me than that mentioned on the other side; for they must all have proceeded on a mistaken idea of the legal definition of a sale in a market, if the construction contended for by the plaintiff's counsel be wrong: whereas that cited by the defendant only shews that some words, which were not absolutely necessary, were inserted by the pleader. But the ground on which my opinion proceeds is, that on the facts disclosed in this declaration, I cannot consider it *as a sale in a market*, unless it be in the mode in which sales are generally made in markets, namely, *by selling the goods which are brought into the market* for that purpose. If the plaintiff's demand had arisen on contracts of sale by sample, he would have brought a different kind of action, namely, an action for the fraud in not bringing the goods into the market. It is not necessary in this case to determine whether or not a right to take toll on goods sold by sample can be supported: it is sufficient for the decision of this case, in the

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(a) *Nota*, The declaration proceeds thus; "per talem personam alicui personæ vel aliquibus personis quibuscunque, sic ut" "prefertur, venditi, vel in burgo prædicto vendendi inducitur, &c." (b) 2 Lutw. 1378.

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present stage of it, to say that the evidence offered at the trial should have been received, and that a new trial ought to be granted.

ASHHURST, J. I am not prepared to say that this non-suit is wrong. This claim being a matter *stricti juris*, it should be laid in the declaration with great precision; because it is to remain on record as evidence of the right to future ages: and if the plaintiff were to recover on this declaration, I think this record would be evidence of a claim of toll on contracts of sale of goods in the market by sample. With respect to the precedents which have been cited; *non constat* but that in those cases the claim might have been of toll on all goods sold, though not brought into the market; and many such instances have existed. Therefore I think that the plaintiff should have shewn on the trial that such was the extent of his claim. But as he confessed that his claim was of a more limited kind, he ought to have laid it as precisely as he intended to prove it.

GROSE, J. (a) As it appears that in point of fact the goods, in respect of which the toll was claimed, were actually brought into the market, I see no reason why the plaintiff should not have stated his claim to arise on the sale of such goods: but still I do not think that the non-suit can be supported. Taking the whole of the declaration together, as this is a claim of toll in specie, I am of opinion that "goods sold in the market" must necessarily mean "goods brought into the market and there sold"; otherwise he could not take the toll in specie; for the *gravamen* is that the plaintiff was *prevented* taking his toll. The precedents also cited by the plaintiff are strong to shew that "sold", as applied to a sale in a market, means a sale of goods which are in the market. Therefore I am of opinion that the motion to set aside the non-suit should be made absolute. And indeed if I doubted on this point, I should be inclined to send this case to be tried again in order that, if the defendant persisted in his objection, it might be put on the record either by tendering a bill of exceptions, or by a demurrer to evidence.

Rule absolute.

(a) Absent Buller, J.

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SHIPMAN *qui tam* against HENBEST.Th. rfday,
Nov. 25th.

THIS was an action of debt on 1 Jac. 1. c. 22. §. 14. for selling leather which had not been searched and sealed. On the trial at the last *Surry* Assizes before *Eyre* Ch. B. it was objected that, as under the 50th section of this statute, the plaintiff might have proceeded in a different form against the defendant before the justices of assize, or justices of the peace at their sessions &c, for this offence, the jurisdiction of the superior courts was taken away by the 21 J. 1. c. 4. §. 1; which enacts "that all offences hereafter to be committed against any
" penal statute, for which any common informer or promoter
" may lawfully ground any popular action, bill, plaint, suit,
" or information, before justices of assize, justices of *Nisi*
" *Prius*, or gaol delivery, justices of oyer and terminer, or
" justices of peace in their general or quarter-sessions, shall be
" commenced, sued, prosecuted, tried, recovered, and determin-
" ed, by way of action, plaint, bill, information, or indictment,
" before the justices of assize, justices of *Nisi Prius*, justices of
" oyer and terminer, and justices of gaol delivery, or before the
" justices of peace of every county, &c, having power to enquire
" of, hear, and determine, the same, &c; and that all and all
" manner of informations, actions, bills, plaints, and suits, what-
" soever, hereafter to be commenced, sued, prosecuted, or award-
" ed, either by the Attorney General &c, or by any common
" informer, or other person whatever, in any of his majesty's
" courts at *Westminster*, for or concerning any of the offences,
" penalties, or forfeitures, aforesaid, shall be void and of none
" effect." But the objection was over-ruled, and a verdict was taken for the plaintiff for one penalty of 6s. and 8d, with liberty to move the Court.

On a former day in this term *Piggott* obtained a rule to shew cause either why a non-suit should not be entered on the construction of the 4th clause of the 21 J. 1. which enables defendants sued on penal statutes to plead the general issue, and give such special matter in evidence, as if pleaded would have been a good bar to the action, or why the judgment should not be arrested on the first clause of the same statute. Against which

Bond, Serj, *Morgan*, and *Marryat*, shewed cause. And with respect to the first part of the rule for entering a non-suit they answered, that the objection, if any, went to the jurisdiction

The stat. 1 J. 1. c. 22. gives certain penalties, to be recovered (sect. 46.) by action of debt or information in the courts at *Westminster*; and the 50th section gives jurisdiction to the justices of assize, of gaol delivery, and of the peace, to enquire of the premises, and to hear or determine the same: under the latter clause the inferior courts can only proceed by indictment or presentment. And the informer may bring an action of debt in the courts at *Westminster*, notwithstanding the 21 J. 1. c. 4; for that statute only restrains the proceedings on penal statutes in the superior courts, where the informer, before the passing of that statute, might have sued in the inferior as well as the superior courts by action, bill, plaint, suit, or information.

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of the Court, which therefore could not have been intended by the Legislature to be submitted as matter of evidence to the jury, but ought to have been pleaded upon the record, so that the Court themselves might judge of it. The special matter intended to be made evidence under the general issue was such matter of fact as ought in ordinary cases to be pleaded. [The Court, being satisfied on this head, directed the counsel to confine their argument to the last objection upon the motion in arrest of judgment; as to which they contended]

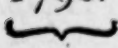
First, That the 21 J. 1. only applies to actions on those statutes which were made prior to it; and though the first statute passed on this subject, to which the present action refers, was anterior to the 21 J. 1., namely in the 1 J. 1, yet that act was only made for a limited time and was re-enacted from time to time by several statutes subsequent to the 21 J. 1.; from which statutes therefore it now derives its operative force. It appears that the 1 J. 1. c. 22. was to continue to the end of the next session of the next parliament. The next parliament was holden in the 7 J. 1.; but the act was not then continued, nor till the 21 J. 1. c. 28. s. 1. N^o. 41. [after the 21 J. 1. c. 4.] when it was continued as from the 7 J. 1. till the end of the first session of the next parliament, which was not till the 1 Car. 1., when it again dropped, but was continued in the same manner as before by 3 Car. 1. c. 4. s. 22. N^o. 14; and so continued by a subsequent statute in 16 Car. 1. c. 4. From whence it appears that at the time when the 21 J. 1. passed there was no such statute in force as the 1 J. 1; and therefore the former could not operate upon the latter; and again it appears to have been re-enacted again by subsequent statutes after having expired. This therefore must be considered as an action founded on a statute passed subsequent to the 21 J. 1. c. 4. which has therefore no control over it; *Hicks's case*, *Salk.* 372. 2d resolution; nor indeed over any statutes passed at the same parliament, as was said by *Hutton, J.* in *Lit. Rep.* 163, and agreed to by the whole court. But, Secondly, the action of debt is not taken away by the 21 J. 1. from the superior courts, even supposing the action to be founded on a prior statute; because the plaintiff has no remedy to recover the penalty given by the 1 J. 1. c. 22. before the justices of peace, or any other inferior jurisdiction mentioned in the 50th section of that statute. The justices have thereby no jurisdiction given to them to distribute the penalties, but only to enquire of

of the premises, which inquiry means in their accustomed manner, namely, by indictment, or presentment, at common law. 1 *Rol. Rep.* 93. 11 *Co.* 60. b; and not by information, bill, or plaint, unless specifically given; Sir *W. Jones* 193. which was determined very soon after the 21 *J. 1. c. 4.* 1 *Burr.* 389. and 2 *Hawk. P. C. c. 1. s. 4.* Then as that statute gave a penalty to the informer, which cannot be recovered by indictment, nor by any action which can be instituted at the assizes or sessions, according to Sir *T. Ray.* 394, the only remedy which the informer under that statute has in order to recover the penalty is by action of debt or information in the superior courts of *Westminster*, which is expressly given by the act creating the penalty; for the 46th section says that it shall be recovered by action of debt in any of the king's courts of record, [which means the superior courts at *Westminster*, *Gregory v. Blackfield*, *Moor* 599. and *Buckston v. Shurlock*, *Styles* 340.] in which suit no wager of law or essoin shall be allowed; words which have always been construed as applicable only to the superior courts at *Westminster*. *Cro. Car.* 112. *Hutt.* 98. Then if the plaintiff could not have recovered the penalty in any inferior court by the 1 *J. 1.*, neither can he by the 21 *J. 1.*; for that statute gives no new jurisdiction to the inferior courts in cases where they had none before, but only restrains the party from suing in the superior courts in those cases where before the superior and inferior courts had concurrent jurisdiction. *Cro. Car.* 112. *Hutt.* 98. *Garland & T. v. Burton*, 2 *Str.* 1103. And therefore the first resolution in *Hicks's* case (a), supposing it to be maintainable, does not affect this case, because that was an information on the 5 *Eliz. c. 4.* which expressly gives an action of debt or information in the inferior as well as the superior courts; and the resolution in *Hicks's* case beyond the point then before the Court on the construction of the last mentioned act was extrajudicial. Besides, there are several instances of actions of debt on this very act of the 1 *J. 1.* having been maintained in this court, and the penalties recovered; one in 1 *Burr.* 497.; and another in *Carth.* 290, where the same objection was expressly taken and over-ruled. This distinction will reconcile all the cases, namely, that where a penalty may be recovered in the inferior courts *eo nomine* as a penalty, the informer is confined to sue for it there by 21 *J. 1. c. 4.*; but that statute does not apply to cases where the penalty

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could only be recovered by the informer in the superior courts before the passing of it; *Leigh v. Kent*, ante, 3 vol. 362: for if it did, the informer would be without remedy, which could not have been intended by the Legislature when they passed that statute.

The Court told the counsel on the other side that they might confine themselves to the last head of argument.

Erskine, Piggott, Palmer, and Shepherd, in support of the rule. It seems now to be admitted that the 21 *J.* 1. c. 4. applies to all those cases where the penalty may be recovered, whether by action or otherwise, in the inferior courts; if so the judgment must be arrested; because under the 50th section of the 1 *J.* 1. c. 22. the justices at sessions must be taken to have had power to distribute the penalties given by that statute; for it is thereby expressly enacted that for the better execution of the act [which extends to every preceding part of it, including consequently the 46th section by which the penalties are distributed], all justices of assize, justices of the peace &c, within their several jurisdictions, *shall inquire of all the premises in their sessions, and hear or determine the same.* The operation therefore of this section was to give the same jurisdiction in substance to the inferior courts, which it had before given to the superior ones by the 46th section; and though it did not give the same mode of recovering the penalties, namely, by action of debt &c, yet in effect it did the same thing by enabling the justices to enquire of all the premises, and hear or *determine* the same; which latter word necessarily implies the power of distributing the penalties upon an indictment; otherwise they could not determine all the premises. And of this opinion was Mr. Justice Denison in 1 *Burr.* 390. Besides, the 50th section of the 1 *J.* 1. makes use of the words "justices of assize". Now they are in possession of all the authority which formerly belonged to the justices in *Eyre*; and informations might have been instituted before them; even the proceedings on the old writ of *quo warranto* were before them. If that be so, the party here had another remedy to recover the penalties, namely, by information before the justices of assize, or even before the sessions, according to *Farren 2, T. v. Williams (a)*, where it was held that an information lay on 5 *Eliz.* c. 4. at the sessions; in either of which cases the jurisdiction of this Court is ousted by 21 *J.* 1. But even supposing the inferior courts had no power to distribute the forfeitures, still the 50th section of the 1 *J.* 1. gives them a jurisdiction over this

(a) *Cowp.* 369.

offence by way of indictment; and in *Hicks's* case (a) it was expressly resolved that the 21 *J.* 1. restrains the jurisdiction of the courts at *Westminster* in actions by common informers, unless the cause of action arise within the county where the court of *B. R.* sits; and that the informer must prosecute by information &c, before the justices of assize &c. That too was not merely a determination upon the particular case, but was the opinion of all the judges assembled to consider the general construction of the 21 *J.* 1.; and this was after the case in *Cartb.* 290, and that of *Barnes v. Hughes* (b), and *Rayner v. Fitler* (c). And in *Smith v. Potter* (d) the Court actually stayed the proceedings in an action on 5 *Eliz.* c. 4. on the ground that the jurisdiction of the superior courts was ousted by the 21 *J.* 1. except in the county where *B. R.* sits. And independently of this construction which has been solemnly put upon it, this appears to be the true meaning of the statute even if it were a new case; for otherwise the statute, which was made "for the ease of the subject" as it professes to be, would have a very confined operation, as it would only attach upon three statutes, 5 & 6 *Ed.* 6. c. 14. (e), & 5 *Eliz.* c. 4. *f.* 39 (f). But on the true construction of the 21 *J.* 1. c. 4. it extends to oust the superior courts of jurisdiction in all cases where the party might before that statute have sued in the inferior courts either by action, information, or indictment: for though in the first branch of the first section the word *indictment* is omitted, yet it is inserted in the second branch, where the word *suit*, which was used in the first, is dropped; so that they seem to have been intended as synonymous. But whatever doubt might formerly have been entertained upon this subject, it must now be removed by stat. 9 *Ann.* c. 11. *f.* 36, which lays certain duties upon hides and skins, and leather, and gives a summary jurisdiction by way of conviction before two justices for all offences against that act, and the act of the 1 *J.* 1. c. 22; and the thirty-seventh section empowers the justices to mitigate the penalties; which latter provision was held in *Cates Q. T. v. Knight* (g), to oust the jurisdiction of the superior courts as to the recovery of such penalties.

Lord KENYON, Ch. J. The accurate discussion, which this case has received, has rendered it so clear as to remove all doubts

(a) *Salk.* 372.

(b) 1 *Ventr.* 8.

(c) 3 *Lev.* 71.

(d) 1 *Str.* 415.

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(e) This is since repealed by 12 *G.* 3. c. 71.

(f) The third instance was not mentioned.

(g) *Ante*, 3 vol. 442.

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about it. This action is brought on the 1 *ſ. 1. c. 22.* which imposes certain penalties; and enacts (by the 46th section) that the penalties shall be recovered by action of debt, bill, plaint, information, or otherwise, in any of his majesty's courts of record, in which suit no wager of law or essoign shall be admitted. Therefore this action may undoubtedly be supported, unless the jurisdiction of this Court be taken away by the subsequent statute of the 21 *ſ. 1. c. 4.* Then the general question must depend on the construction of this act of parliament. But some preliminary questions having been made, they may be first disposed of. It has been argued that the 21 *ſ. 1.* does not extend to acts passed subsequent to it, and that this may be considered as an action brought on a subsequent statute; the 1 *ſ. 1. c. 22.* having expired before the 21 *ſ. 1.* and having been only re-enacted since that time. But on this point I have not entertained a doubt from the beginning. We are all most clearly of opinion that this must be considered as an action on the 1 *ſ. 1. c. 22.*; and that the subsequent laws, which have continued it from time to time, all give effect to it as an act made in the reign of the 1 *ſ. 1.* Therefore all the cases, which decide that this statute of the 21 *ſ. 1.* prohibit this mode of proceeding, will apply to this case, as far as respects the date of the act of parliament, provided it applies to it in other respects. Another objection made at the bar was that the 9 *Ann. c. 11.* has inflicted other penalties for this offence; and that, because a summary mode of proceeding is given by the 36 & 37 *ſect.* of that act before two justices with a power of mitigating the penalties, the jurisdiction of this Court is taken away; for which the case of *Cates 2, T. v. Knight* was cited. But that argument is totally unfounded; the penalties in the latter statute are accumulative, and imposed with a different view; and this statute does not affect to repeal the provisions of the 1 *ſ. 1. c. 22.* It was not pretended in the case cited that a later statute necessarily repealed the penalties given by a former law; the sole question there depended on the construction of two different sections in the same act of parliament. Then as to the principal question in the case; an attentive consideration of the words of 21 *ſ. 1. c. 4. ſ. 1.* will remove all doubts concerning it: it enacts "That
" all offences against any penal statute, for which any com-
" mon informer may lawfully ground any popular action, bill,
" plaint, suit, or information, *before justices of assize, justices of Nisi*
" *Prius, or gaol delivery, justices of oyer and terminer, or justices of*
" *peace*

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“*peace in their sessions*, shall be commenced, sued, prosecuted, tried, recovered, and determined, by way of action, plaint, bill, information, or indictment, before the justices of assize, &c, or before the justices of peace of every county, city, &c, wherein such offences shall be committed &c, and not elsewhere, &c.” Then this act of parliament does not extend to all proceedings on penal statutes; it only prohibits the proceedings in the courts of *Westminster* in all those cases where popular actions, bills, plaints, suits, or informations, might have been brought in the inferior courts. But neither of those modes of proceeding, to recover the penalty inflicted by the 1 J. 1. c. 22., is given by the 50th section of that act; and that clause only enables justices of assize, justices of peace, &c, within their several jurisdictions, to *enquire* of all the premises in their sessions, leet or law-days, and to *hear or determine the same*. Now when a power is given to a jurisdiction, which does not ordinarily entertain actions, bills, or plaints, and that power is only generally to enquire of, hear, and determine, the offence, it must be understood to mean by the common law mode of proceeding, namely, by indictment, or presentment. There is no pretence to say that an action, bill, or plaint, can, by the common law, be brought at the assizes, the sessions, or at courts leet. Therefore it appears most clearly that the statute 21 J. 1. c. 4. has only excluded the jurisdiction of the superior courts in certain enumerated cases; and, as this is not one of those cases, the statute 21 J. 1. does not apply to it. It was argued that the 21 J. 1. c. 4. is a beneficial law, and ought to be extended as far as possible: but if the Legislature had thought so, they would have extended the benefit of it to all penal statutes passed subsequent to it, which are infinitely more numerous than those made before that time; and I think it is more beneficial to the subject that his cause should be heard and determined by the superior courts of record. Then several cases were cited at the bar to shew that this statute restrained the proceedings on all prior penal statutes to the courts below: but all those cases are founded on the statute 5 *Eliz.*; the 39th section of which expressly gives power to justices of oyer and terminer, and justices of the peace &c, to hear and determine the offences contrary to that statute as well by indictment, as by *information, action of debt, or bill of complaint*. This act, having given an action in inferior jurisdictions, however dissimilar it is to the common law remedy, precisely shews the meaning of the 21 J. 1. c. 4, and to what

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cases that latter statute applies. On the whole, therefore, considering the authorities which have been cited, the statute of the 5 *Eliz. c. 4*, and that of the 21 *J. 1. c. 4*, I am clearly of opinion that the latter act only applies to those cases where proceedings by way of action, bill, plaint, suit, or information, may be commenced in the inferior courts; and consequently that it does not extend to the present, where no such proceeding can be instituted.

ASHHURST, J. It is a clear principle that where the superior courts have a jurisdiction, it can only be taken from them by the express words of an act of parliament, or by necessary implication. Here it is admitted that an action might be maintained in the superior courts by virtue of the statute on which this action is brought: then the question is whether that jurisdiction be or be not taken away by the 21 *J. 1. c. 4*. Now the meaning of that act I take to be this; that where the superior and inferior courts have a concurrent jurisdiction *both as to the subject matter, and as to the mode of proceeding*, the jurisdiction of the former is taken away. And it is clear that in this case the statute 1 *J. 1. c. 22*. did not give to the inferior courts a concurrent jurisdiction with the superior ones as to the mode of proceeding; for it did not give to the informer a power of suing for the penalty in the inferior courts by action, bill, plaint, suit, or information. Then it follows that the 21 *J. 1.* does not apply to this case; for it appears from the case cited from *Cartbew* that that statute did not give a jurisdiction to inferior courts in cases where they had none before. But it was argued that the 21 *J. 1. c. 4*. applies to this case, because the inferior courts have jurisdiction over this subject matter in *some* mode of proceeding, namely, by indictment, and that that statute restrains the proceedings in the superior courts where the informer may sue by *any* mode in the inferior courts: but that argument militates against a known principle of law, that the jurisdiction of the superior courts is not to be taken away but by express words, or by necessary implication.

BULLER, J. It is now too late to say that the statute 21 *J. 1.* gives a new jurisdiction to the inferior courts; to this point the case in *Cartbew* is a direct authority. But it has been argued that though it give no new jurisdiction, yet that it repeals so much of the 1 *J. 1. c. 22*. as gives the *action*, and leaves the informer to sue by indictment: but that is directly contrary to the case cited from *Cartbew*, where an action, similar to the present,

sent, was maintained, and this very objection was over-ruled. Then an argument was drawn from the preamble of the 21 *J.* 1, which professes to be an act "for the ease of the subject"; and it was contended that, if this construction were put upon it, it would only apply to two or three statutes, and therefore that the intention of the Legislature would be frustrated. But as the words of the enacting part are clear and positive, we cannot have recourse to the preamble to extend the construction of the act. Besides, it appears that almost all the cases, which existed previous to the 21 *J.* 1., and which must be taken as the foundation of that statute, were proceedings on the 5 *Eliz.* c. 4.: now if there were many actions on that statute, that alone might have been considered as a sufficient grievance to induce the Legislature to remedy it, by restraining the proceedings to the inferior courts in cases where those courts had jurisdiction. Therefore it seems to me that the true meaning of the statute is this; that wherever by any act then in force, the informer might have sued by action, bill, plaint, suit, or, information, in the inferior courts as well as in the courts at *Westminster*, he is confined to sue in the former: but, as that statute gives no new jurisdiction to the inferior courts, the party may still sue in the courts at *Westminster* for all those penalties which could not, before the passing of that statute, have been recovered in the inferior ones.

GROSE, J. The words of the 21 *Jac.* 1. c. 4. are strong in favor of the construction which has been put upon them: but, if they were doubtful, the cases, which have been determined upon this subject, are decisive. For in all of them, in which it has been holden that the 21 *Jac.* 1. restrains the proceedings to the inferior courts, those courts had an express jurisdiction. That this is the true construction also appears from other statutes, in which the Legislature has expressly given to inferior jurisdictions a power to distribute the penalties. On the whole I am clearly of opinion that in this case the informer could not have recovered the penalty by action, bill, plaint, suit, or information, in the inferior courts, by virtue of the 1 *Jac.* 1. c. 22; that it was not the intention of the Legislature, in passing the 21 *Jac.* 1. c. 4., to give such a jurisdiction; and that that statute is only applicable to cases, where, before that time, the penalty might have been recovered in the inferior as well as the superior courts by action, bill, plaint, suit, or information.

Rule discharged.

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Friday,
Nov. 26th.

Plaintiff cannot sign judgment for want of a plea till the expiration of 24 hours after demand of a plea, whether the time for pleading be or be not expired when such demand is made.

BOWLES and Another *against* EDWARDS.

ON a motion to set aside the interlocutory judgment for irregularity, the facts appeared to be these; after the time for pleading expired, the plaintiff served the defendant with a rule to plead, and *within 24 hours* afterwards signed judgment for want of a plea.

Marryat, in support of the rule, insisted that this was irregular, for that the defendant had 24 hours after demand of a plea in which to deliver his plea; and he cited *Dyche v. Burgoyne* (a), where this point was ruled.

Walton, contra, said that it did not appear in the case cited that the time for pleading had expired before the demand of the plea; and that therefore it was distinguishable from the present. But

The Court held that there was no difference in this respect between that case and this; for that at all events the plaintiff cannot sign judgment till the expiration of 24 hours after the demand of a plea. And they made the

Rule absolute.

(a) *Ante*, 1 vol. 454.Saturday,
Nov. 27th.

A husband is not bound to maintain his wife's child by a former husband.

TUBB and Others *against* HARRISON, and Another.

THIS was an action on a covenant; in which the defendants, who were father and son, after reciting that differences had arisen between the son and his wife, and that they had agreed to live separate, covenanted to the plaintiffs to pay the wife an annuity of 50 l. a year, and to pay all the debts contracted by her, *which her husband was by law liable to pay*. The breaches assigned were (amongst others) that the wife had then contracted a debt of 56 l. 16 s. 9 d. to *J. Brighton*, for necessary board and lodging, and other necessaries, and for money paid and laid out for necessaries for *Mrs. Harrison*, and one *John Perrin* her infant son by a former husband, at her request. On the trial of this cause before Lord *Kenyon*, at *Guildhall*, it was agreed that the plaintiffs should take a verdict for 150 l.; and that it should be referred to an arbitrator to take an account of the particulars of the several demands so that the same might be stated to this Court, subject to their opinion and direction on the construction of

of the covenant in the deed of separation, whereon the action was brought, and whereby the defendants covenanted to pay all the debts contracted by *Sarah Harrison* the wife, which her husband was by law liable to pay. The account being now delivered in, it appeared that several of the items were for the maintenance of her infant son by a former husband.

This matter was shortly spoken to at the bar; and the case of *Rex v. Munden*, as reported in 1 *Str.* 190, was relied on; where it was held that a husband was not bound to maintain his wife's mother. But it not appearing from the statement of that case, either in *Strange* or in *Burn*, whether or not the wife were alive at the time, the Court took time to consider of the point; and on a subsequent day,

Lord KENYON, Ch. J. said that he had seen a copy of the order in *R. v. Munday* (a), taken from the records of the Court, by which it clearly appeared that the wife was alive (b) when the order was made. The Court in that case reversed the order of maintenance, on the ground that the statute of *Elizabeth* (c) only extends to natural relations. Therefore, on the authority of that case (d), we are of opinion that the husband is not liable for the expences of maintaining the wife's child by the former husband; and consequently that those articles in the account must be disallowed.

(a) His Lordship also observed that the name of that case was *Munday*, and not *Munden*, as reported in *Str.*

(b) And so it appears by the report of the same case in *Fort.* 303.

(c) 43 *El. c. 2. f. 7.*

(d) The order of maintenance in *R. v. Benoit*. 2 Lord Raym. 1454. was also quashed on the authority of *R. v. Munday*.

DE MORANDA and Others against DUNKIN and Others.

Monday,
Nov. 29th.

THE plaintiffs, having taken out a *capias ad satisfaciendum* against the defendants, sent it to *Painter* their agent in *Cornwall*, who applied to the sheriff for a warrant on it, directed to his own clerk, assigning as a reason for not making application to the under-sheriff in the usual mode, that the latter was concerned as attorney for one of the defendants. The sheriff, after making several objections, at length granted a warrant to *Rogers*, *Painter's* clerk. *Dunkin* was arrested upon this warrant, and escaped; whereupon the plaintiffs obtained a rule against the sheriff to return the writ; which rule

If the sheriff appoint a special bailiff at the plaintiff's request, the latter cannot rule the sheriff to return the writ.

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Burrough now moved to set aside; insisting that the plaintiffs had no right to call for a return of the writ, as the sheriff had granted the warrant to a special bailiff at their particular request, and of their nomination.

Marryat opposed this motion in the first instance on several grounds. First, As the attorney for the plaintiffs gave *Painter*, their agent, no special directions with regard to the execution of the writ, *Painter* exceeded his authority, and the plaintiffs are not bound by it. In *Yates v. Freckleton*. *Dougl.* 600. Payment of the debt to the agent in the country was held not to be a payment to the plaintiff. But even if the agent in the country could bind the principal by such an act as the present, yet the sheriff was not obliged to constitute a special bailiff: but, having done so, he is bound to return the writ, and he has his remedy over against *Painter*. *Atterton v. Harwood*. 1 *Ro. Ab.* 98; and 4 *Bac. Abr.* 442. At all events, the sheriff ought to return these facts on the writ, if he be advised that they constitute a defence, in order that the question may be solemnly determined.

LORD KENYON, Ch. J. The rule, which has been obtained, to require the sheriff to return the writ, cannot be supported. The plaintiffs say, that, because the bailiff, nominated by them and at their special request, has misconducted himself, the sheriff shall be answerable for his misconduct: but it seems to me that it was a groundless application. The cases cited are not applicable to the present: The question in *Yates v. Freckleton* was, whether or not the agent were authorized to receive the debt; and the Court very properly determined that he exceeded the power given to him. But here the agent was empowered to put the writ in force, which certainly includes the form and the mode of executing it.

BULLER, J. The plaintiffs have acted wrong throughout. In the first place the application to the sheriff was out of the ordinary course of business; he is ignorant of the forms of the office; and though he be responsible for the acts of his under-sheriff, yet this kind of business is entirely conducted by the under-sheriff. The application too was for a favor; it was to indulge the plaintiffs with the nomination of their own bailiff; who perhaps suffered the party to escape in order to charge the sheriff. And now the plaintiffs contend that, by this contrivance, they are entitled to maintain an action against the sheriff for the purpose of driving him to bring another action against their own agent. But this question does not arise now for the first time; it has been

been repeatedly held that if a special bailiff be appointed on the nomination of the plaintiff, the latter must take the consequence of the acts of the former: The Court has considered them as the acts of the plaintiff himself, and has refused to call on the sheriff to return the writ in such cases.

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Rule absolute (a).

(a) The same point was determined in *Hamilton v. Dalziel*. C. B. Hil. 1774.

NUTT against VERNEY and Others.

WOOD moved to discharge the defendant *Verney* out of custody on filing common bail, upon the affidavits of his physician and his keeper, that he was insane *at the time of the arrest*. And he said that this was different from the case of *Kernot v. Norman* (a); for there the defendant became insane *after* the arrest; and therefore, as the arrest was legal at first, the Court might on that account have refused to interfere. But

The Court will not discharge a defendant out of custody on filing common bail, on the ground that he was insane at the time of the arrest.

Per Curiam. We cannot interfere in this case any more than in the other.

Rule refused.

(a) *Ante* 2 vol. 390.

BENNET against NICHOLS.

ON a motion to set aside a *feri facias* on the ground of irregularity, the only question was how many days were allowed to a defendant to put in bail in error; the judgment was signed on a *Monday*, and execution taken out on the *Friday* following.

A defendant has four clear days after final judgment to put in bail in error.

The Court (after consulting with the Master,) said, that he had four clear days (a), and that the plaintiff in this case was not entitled to sue out execution till the *Saturday*. And they made the

Rule absolute for setting aside the execution.

Burrough in support of the rule. *Mingay, contra*.

(a) *Vid. Jaques v. Nixon, ante, 1 vol. 279.*

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Monday,
Nov. 29th.

The Court
will permit
a devisee, not
having been
in possession,
to defend in
ejectment as
landlord un-
der 11 Geo. 2.
c. 19. s. 13.

LOVELOCK on the Demise of NORRIS *against*
DANCASTER.

MORGAN obtained a rule to shew cause why a rule, to permit *J. E. Waight*, a devisee in trust, to defend as landlord under 11 Geo. 2. c. 19. s. 13., should not be discharged; on the authority of a similar decision in the last Term (a).

Burrough now shewed cause; observing that in the former determination the person who wished to defend was the *cestui que trust*, and that it could not therefore govern the present case. He said this was a stronger case than that of a Lord claiming by *escheat*; because the devisee could always distrain on the tenant, even before the statute of *Anne*. And in *Fairclaim v. Sham-title* (b), Lord *Mansfield* said, "if the heir had refused [to permit the lord to defend] the Court would have admitted the lord to defend."

Lord KENYON, Ch. J. asked *Morgan* whether he would consent to try it in an issue "*deviseavit vel non*"; and on his refusal,

The Court

Discharged Mr. *Morgan's* rule.

(a) *Ante*, 3. vol. 783. *Nota*, There is a mistake in that case; the application to defend was there made by the *cestui que trust*.
(b) 3 *Burr.* 1303.

The KING *against* THOMAS AMERY (a).

The Same *against* JOHN MONK.

THE judgments in these cases were reversed in the HOUSE OF LORDS, April 20th 1790.

(a) *Vide* 2 vol. 515.

The End of MICHAELMAS TERM.

C A S E S

1791.

ARGUED and DETERMINED

IN THE

Court of KING'S BENCH,

IN

Hilary Term,

In the Thirty-first Year of the Reign of GEORGE III.

MITCHELL *against* OLDFIELD.

Tuesday,
Jan. 25th.

IN this action the plaintiff recovered a judgment against the defendant for 182*l.* 10*s.* But the defendant, having also recovered in another action against this plaintiff and another, obtained a rule to shew cause why the debt and costs in the latter should not be set-off against the judgment in the former action; suggesting (among other reasons) that *Mitchell* had absconded.

Bearcroft now shewed, on behalf of *Mitchell's* attorney in the first action; contending that, as he was not concerned as attorney in the other action, he had a lien for his costs on the judgment obtained by his client. He also hinted that perhaps the Court would not interfere at all in this case; inasmuch as one debt was due to the plaintiff alone, whereas the other was the joint debt of the plaintiff and another to the defendant; and he observed that this was not such a debt as could be set-off under the statute. But

Lord KENYON, Ch. J. said that this did not depend on the statutes of set-off, but on the general jurisdiction of the Court over the suitors in it; that it was an equitable part of their jurisdiction, and had been frequently exercised. But, as to the

If *A.* recover against *C.*, and *C.* recover against *A.* and *B.*; the court will permit *C.* on motion to set off the damages which he has recovered against those obtained by *A.*, on his undertaking that the bill of *A's* attorney in the first action shall be satisfied; he having a lien on the judgment for his costs.

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other point, he observed that the attornies and solicitors of the different courts have a lien on all papers in their hands, and judgments recovered, for their costs; that in the court of Chancery they were permitted to retain title deeds for that purpose (a); and he thought it right that the attorney in this case should be satisfied for his costs before the defendant was allowed to make the set-off.

BULLER, J. Though this Court have said that they will not interfere on the behalf of the attorney, and prevent the plaintiff settling his own cause without first paying the attorney's bill (b), yet when the adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the Court will take care that the attorney's bill is satisfied.

The Court made the rule absolute, on the defendant's undertaking to pay the attorney's bill, and on his entering a remittitur in the cause in which this defendant was plaintiff.

(a) *Vide ante*, 3. vol. 275.

Griffin v Eyles, H. Bl. Rep. C. B. 122.

(b) *Vid. Welch v. Hole*, Dougl. 226. and

Ex Parte WILLIAMS.

Wednesday,
 Jan. 26th.

The Court will not refer an attorney's bill to be taxed, if all the business be done at the quarter sessions; *secus*, if some part be done here.

GIBBS moved that an attorney's bill for fees, all of which were due for carrying on a prosecution by indictment at the quarter sessions, should be referred to the Master to be taxed. But

The Court (after being informed by the Master that in point of fact such a reference (a) had never been made before) said, that they could not interfere, *the whole* of the business having been carried on in the inferior court: But that, if *any part* (b) of the attorney's demand had arisen from the conduct of business in this Court, they would have referred the whole bill.

Rule refused (c).

(a) The 2 Geo. 2. c. 23. s. 23. (after enacting that no attorney shall bring any action on his bill until it has been delivered a month) proceeds thus; "and upon application of the party chargeable by such bill, or of any other person in that behalf authorised, unto the Lord Chancellor, or the Master of the Rolls, or unto any of the courts aforesaid, or unto a judge or baron of any of the said courts respectively, in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted," they may refer the bill, &c, to be taxed.

(b) *Vid. Dougl.* 189. n. S. P.

(c) *Williams v. Jackson*, Hil. 30 Geo. 3. B. R. S.P. *Stephenson v. Taylor* and Another, York Summer Assizes, 1786, cor. Buller, J. An action was brought for business done by the plaintiff as an attorney in conducting a prosecution at the quarter sessions for the defendant: No bill was delivered. Buller, J. was of opinion that by the 2 Geo. 2. which requires an attorney to deliver his bill, it was not necessary to do so for business done at the sessions; the statute only prescribing it in case of business done in a court of record wherein attornies are admissible and sworn.

The KING *against* FIELD (the Rector) and Others,
The Churchwardens of the United Parishes of St.
ANN, St. AGNES and ZACHARY.

1791.

Wednesda.,
Jan. 26th.

THIS was a rule calling on the defendants to shew cause why a *mandamus* should not issue, commanding them to grant their certificate to the bishop of the election of Mr. Love to the lectureship of this parish, in order that the bishop might license him. It appeared that at the election to this office, which is made by ballot by the parishioners paying scot and lot, and not receiving alms from the parish, 157 names were put into the glass, 79 of which were for Mr. Rose, and 78 for Mr. Love: but only 156 were taken out, 78 for each candidate. But that two of Rose's voters were not qualified, by not paying scot and lot. It also appeared that there was no endowment for the lecturer, but that he received a certain sum from the parish-officers out of the money raised by the poor-rates.

Mandamus to the rector to certify to the bishop the election of a lecturer refused; there being no immemorial custom for the lecturer to use the pulpit without the rector's consent, and the lecturer being paid out of the poor-rates.

Mingay now shewed cause; and relied on the authority of *R. v. The Bishop of London* (a), to shew that the rector could not be compelled to consent to the election, the lecturer being supported by voluntary contributions, and there being no immemorial custom to elect without his consent.

Adam, in support of the rule, said, that this case was distinguishable from the one cited, that being a contest between the parishioners and the rector, whereas this was between the two candidates. And he observed that this application was merely for the purpose of putting the question into a course of investigation, who had the majority of legal votes.

Lord KENYON, Ch. J. This is an application for a writ of *mandamus* in order to enable the party applying to establish his right to *some permanent interest*: but it now appears that the object of contention is not an interest of that nature. I readily subscribe to the opinion of Lord Mansfield, in the case cited, that no person can use the pulpit without the rector's consent, unless there be an immemorial custom for it; where there is such a custom, it is binding on the rector, as it supposes a consideration to him. In such a case the right of the lecturer partially supercedes the right of the rector. But in the present case there is no such custom; and the emoluments are not permanent; they depend on voluntary contributions, being taken out of the poor-

(a) *Ante*, 3 vol. 331.

rates,

1791.

The KING
against
FIELD,
and Others.

rates, and have commenced within the time of legal memory: there is therefore no right stated in the party which can be the subject of legal contention.

BULLER, J. It was incumbent on the party making this application to shew that he has a right to obtain a certificate from the rector and churchwardens of his having been elected lecturer: but it now turns out that there is no such office in this parish in point of law, and therefore the party applying cannot be elected to it.

Rule discharged.

Saturday,
Jan. 29th.

The KING against E. TOPHAM.

An indictment for publishing libellous matter, reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, and to stir up the hatred of the king's subjects against them, and to excite his relations to a breach of the peace, cannot be supported. Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper, and had occasionally applied at the stamp-office respecting the duties, is evidence that he is the publisher.

THE defendant was indicted for a libel reflecting on the memory of the late Earl Cowper; on the trial of which, before Mr. Justice Buller, the defendant was found guilty. The indictment charged that "the defendant, being a person of a wicked and malicious disposition, and wickedly and maliciously contriving, and intending, to injure, defame, disgrace, and vilify, the memory, reputation, and character, of *George Nassau Clavering, Earl Cowper*, then deceased, and to cause it to be believed that the said earl in his life-time was a person of a vicious and depraved mind and disposition, and destitute of filial duty and affection, and of all honourable and virtuous sentiments and inclinations; and that the said earl had led a wicked and profligate course of life, and had addicted himself to the practice and use of the most criminal and unmanly vices and debaucheries, on &c, at &c, with force and arms, wickedly, maliciously, and unlawfully did print and publish, and cause to be printed and published in a certain newspaper called "*the World*," a certain false, scandalous, and malicious libel, of and concerning the said earl *Cowper*," &c. The indictment then set forth the publication with proper innuendos; and it concluded "to the great disgrace and scandal of the memory, reputation, and character, of the said G. earl *Cowper*; in contempt &c.; to the evil example &c.; and against the peace &c. A rule was obtained in last *Michaelmas* Term, to shew cause either why a new trial should not be granted, or why the judgment should not be arrested.

Erskine, Chambre, Garrow, and Martin, shewed cause against the rule; and *Mingay, Graham, and Conste*, supported it. These questions were argued very much at length on general principles;

ples; and the principal case cited in support of the indictment was that in 5 Co. 125. *De libellis famosis*.

The Court took time to consider of the questions; and now Lord KENYON, Ch. J. delivered the opinion of the Court.

This was an indictment for a libel, tried before my brother Buller, who left to the consideration of the jury the two questions, which generally arise on these trials, namely, whether the defendant were or were not the publisher, and whether the innuendos were made out; and the jury found the defendant guilty. An application was made in the last term for a new trial, or to arrest the judgment. The grounds for the former were that another question should have been left to the jury, namely, whether this paper were published in the spirit of a biographer, or with a malicious intention to defame and vilify the character of Lord Cowper. Of the first question which the jury determined, whether the defendant were or were not the publisher, there can be no doubt whatever; the evidence was perfectly satisfactory. It was proved that the paper was sold at the office; that the defendant as proprietor of the paper had given a bond to the stamp-office, pursuant to the 29 Geo. 3. c. 50. §. 10., for securing the duties on the advertisements; and that he had from time to time applied to the stamp-office respecting the duties on the paper. It is impossible therefore to say that this was not strong evidence to be left to the jury to shew that he was the publisher. Then it was asked at the bar, shall every person, who is a proprietor of a paper, as a feme covert, an infant, or a trustee, be answerable *criminally* for the acts of the agent, in inserting libellous matter in the paper? To that question it is sufficient to answer, that this is not one of those cases. This was the case of an adult. And this unquestionably was proper evidence to the jury, who have drawn the only conclusion which, in the discharge of their duty to themselves and the Public, they could draw. Then it was argued that, even supposing there was sufficient evidence of publication, there was no evidence of a criminal intent in the defendant. To this I can answer in the words of Lord Mansfield, in *R. v. Woodfall* (a), that "where the act is in itself unlawful, (as in this case), the proof of justification or excuse lies on the defendant; and, in failure thereof, the law implies a criminal intent." There may indeed be cases, and so it was admitted in *R. v. Nutt* (b), of a publication in point of law, where no criminal intention can be imputed to the party, as

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(b) Fitz. 47.

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where a person delivers a letter, without knowing its contents, or delivers one paper instead of another. But here no evidence was offered to the jury to disprove the publication: The case was nakedly left to them to make that inference, which necessarily arises from the publication of a paper, which at present I am supposing to reflect on the memory of the nobleman mentioned in the indictment. Therefore, we are of opinion that the questions put to the jury were the only questions which it was the duty of the judge to leave to them, and that they have drawn the only inference which could fairly be drawn from that evidence; and consequently that there is no ground for a new trial.

The next question is, whether or not the judgment ought to be arrested; and that question is supposed to have some novelty in it. The only judicial decision on this subject, which was cited at the bar, was that in 5 Co.; the case *de libellis famosis*; where it is said that publications defamatory of dead persons are libellous; and the reason given is, because it tends to stir up others of the same family, blood, or society to revenge, and to break the peace, by provoking them to vindicate the memory of the deceased, and to wipe off that stain which the reflections on the ancestor may cast upon them. But it is to be observed that that was not the point in judgment; for it was a libel on the living archbishop as well as on his predecessor; and therefore the judgment for the former might well have been sustained, without going into the other point incidentally mentioned by the Court. In 1 Hawk. P. C. (a) it is said, "the chief cause, for which the law so severely punishes all offences of this nature, (libels), is the direct tendency of them to a breach of the public peace, by provoking the parties injured, and their friends, and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which of all others are most sensibly felt." Now it is fit to compare the manner in which this indictment is drawn with others of a similar nature. This professes to be a libel, merely reflecting on the memory of the late Earl Cowper; and it does not state that it tended to excite his relations to revenge, and a breach of the peace. In other cases, particularly in those reflecting on king William, the indictments charged that they were published to slander the government (b), with a view to counteract the revolution. We have seen the indictment in *R. v. Critch-*

(a) 1 Hawk. P. C. c. 73. s. 3.

(b) Cartb. 405.

ley (a); in which it was alleged that the defendant," intending to vilify and scandalize the memory of Sir C. Gaunter Nicoll, &c. and to induce a belief that the said Sir C. Gaunter Nicoll had obtained the order of knighthood of the Bath by vile and scandalous means;" thereby reflecting on the government which has the distribution of honours; "that he had acted as an enemy to his kingdom, and had voted as a member of parliament corruptly and perniciously, contrary to his duty &c; and maliciously to fix a mark of infamy, contempt, and dishonour, on the memory, name, and family, of the said Sir C. G. Nicoll, &c, and to stir up the hatred and evil will of the subjects of the king against the family and posterity of the said Sir C. G. Nicoll." Now to say, in general, that the conduct of a dead person can at no time be canvassed; to hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good, would be to exclude the most useful part of history. And therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, as in *R. v. Cbrichley*, then it comes within the rule stated by *Hawkins*; then it is

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(a) *Hil. 7 Geo. 2.* There an information was granted against the defendant for publishing a libel reflecting on Sir C. Gaunter Nicoll, Lady Dartmouth's father, and on the government. The information (after describing Sir Charles's public situation in life,) stated that the defendant "envying the good name, and character, of the said Sir Charles Gaunter Nicoll, and maliciously devising and intending to vilify and scandalize the memory of the said Sir Charles, and to traduce and misrepresent him as a person of corrupt and wicked principles, and to induce a belief in the subjects of our said lord the king, that the said Sir C. had obtained the honourable order of knighthood of the Bath by vile and scandalous means, and that he had acted as an enemy to this kingdom, and had voted as a member of parliament corruptly, and perniciously, contrary to his duty as a subject of our said lord the king, and a member of the said parliament; and maliciously to fix a mark of infamy, contempt, and dishonor on the memory, name, and family, of the said Sir C.; and to excite others, the subjects of our said lord the king,

to blacken and defame the memory of the said Sir Charles, and to stir up the hatred and evil will of the subjects of our said lord the king against the family and posterity of the said Sir Charles, after the death of the said Sir Charles, to wit, on, &c, published &c," the following libel, (introducing the proper innuendos.) "On Saturday evening died of the small pox, at his house in Grosvenor Square, Sir Charles Gaunter Nicoll, knight of the most honourable order of the Bath, and representative in parliament for the town of Peterborough. He was blessed with an ample fortune, which he enjoyed in a manner that rendered him in early years of life a truly valuable husband, and a friend. He could not be called a friend to his country; for he changed his principles for a red ribband, and voted for that pernicious project, the excise." The information concluded "to the great scandal and reproach of the name and memory of the said Sir Charles; to the great injury of his family and posterity; and to the dishonour of our lord the king, &c."

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done with a design to break the peace, and then it becomes illegal. But on that question the jury ought to have had the power to deliberate; something like that which was stated in *Chrichley's case*, and in *R. v. Horne (a)*, should have been stated. We are therefore of opinion that, as nothing of that sort is stated in the prefatory part of this indictment, as that it was published with an intent to create any ill blood, or to throw any scandal on the family and posterity of Lord Cowper, or to induce them to break the peace in vindicating the honour of the family, this judgment should be arrested.

Rule absolute to arrest the judgment.

(a) *Cowp.* 672.

Friday,
Jan. 28th.

The Mayor and Burgeſſes of LYNN REGIS, other-
wiſe KING'S LYNN, NORFOLK, *againſt* The
Mayor, Commonalty and Citizens of LONDON; in
Error.

An action
will not lie
on the writ
*de eſſendo
quietum de
theolonio* until
the plaintiffs
goods be dif-
trained for
toll.

THIS action was brought in the court of Common Pleas. The declaration (a) alleged that the plaintiffs (below), among other liberties and privileges, had immemorially enjoyed this privilege, namely, "that the *citizens* of the ſaid city, and all their goods, ſhould be quit and free of and from all toll, paſſage, and laſtage, and other cuſtoms, throughout the whole kingdom of *England*, and the ports of the lord the king, except only his due and ancient cuſtom and prizes of wines;" which liberties have been confirmed by divers acts of parliament. That the king by his certain writ commanded the defendants (below) to permit the plaintiffs to be quit of yielding ſuch toll &c. as aforeſaid, or on a certain day paſt to ſignify to him cauſe wherefore they had not executed his commands, yet that the defendants, not regarding the writ, had not ſignified to him &c, and ſince the time of the ſaid writ, *ſc.* on the 1ſt December 1787, *diſquieted the ſaid citizens on the occaſion aforeſaid*, and then and there required of *O. Denton* [and four other perſons by name] citizens of &c, and of other citizens &c, toll &c, within their ſaid borough &c.; in contempt of the king, and to the damage of the ſaid mayor, commonalty,

(a) The writs, and the declaration, are ſtated at length in *H. Blackſt. Rep. C. B.* 206; together with the ſubſequent proceedings in the court of Common Pleas.

and citizens of 100*l.* &c. The defendants, in their first plea, traversed the right of exemption claimed by the plaintiffs; and, in the second, pleaded that *O. Denton*, and the four other persons named in the declaration, were not citizens of the said city; on both which pleas issue was joined.

At the trial the jury found a verdict for the plaintiffs on both the issues, and gave 1*s.* damages; which damages were remitted on the record. And the court of Common Pleas gave judgment "that the citizens of the said city, and all their goods, be quit of yielding such toll, passage, lastage, and other customs, as aforesaid, of their goods and things, in the said borough and port thereof; and the said mayor and burgeses of the said borough in mercy, &c." The defendants removed the record into this Court by a writ of error.

This case was argued in last *Trinity* term by *Runnington*, Serjt. for the plaintiffs in error, and *Gibbs* for the defendants; and again on this day by *Le Blanc*, Serjt. for the former, and *Adair* Serjt. for the latter.

For the plaintiffs in error, it was objected, first, that the writ was only a *prohibitory* writ, which was issued by the crown to its own bailiffs and servants, and not a *remedial* writ, on which the parties could plead. *Fitzberbert* (a), treating of this writ, seems so to have considered it; and the instance he gives is, that of a mere command by the king to his bailiffs; "The king to his bailiffs of *J.*; greeting." And commenting on the writ he says, "and upon that he may have an *alias*, a *pluries*, and an attachment." The only consequence therefore of not obeying the *pluries* is that an attachment may issue against the party, to whom the writ is directed, for his contempt; but no further proceedings can be had on it. *Finch* also considered this only as a prohibitory writ; for he gives it as one of the instances (b) in his chapter, "of certain special writs wherein no process lieth (c);" and of them he says, "beside which (namely, the common actions) there be certain other originals out of Chancery, which are (as it were) special anomalies and exceptions from the former; being not deductory to bring any matter into plea or solemn action, but only commendatory or prohibitory to do or leave something undone. And therefore no process at all lieth in these writs, but only an attachment upon a contempt, for not executing or obeying them." Lord Ch. B. *Comyns* too, treating of the remedies which a party

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(a) *Fitz. N. B.* 518. 4to. ed.(b) *Finch.* 506.(c) *Id.* 490. *Id.* 48.

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who is exempted from paying toll, has, says there are two remedies (a); first, by *writ de effendo quietum de theolonio*, if he, who ought to be quit of toll, be *charged*; 2dly, by *action*, if the toll be *taken*. He therefore distinguished between the cases of *demanding* and *taking* toll; and was of opinion that in the latter only could an action be maintained. *Fitzherbert*, in his comments on the writ of *monstraverunt*, which was framed for the benefit of tenants in ancient demesne, says (b), "the plaintiffs may count, and recover damages:" but in his comment on the writ in question, he says nothing respecting the pleadings upon it. But even if this were a writ on which the plaintiffs could *count*, they have not stated any injury on the record, for which the law gives redress. The only matter alleged as a grievance is that the defendants (below) *required*, not that they *took*, the toll from the plaintiffs: but this is not a *damnum* for which the law will give an action; an actual injury must be stated. Besides, this count is on the *pluries*, not on the attachment; and even in *monstraverunt* the count must be on the attachment. Secondly, But if any action could be maintained in this case, it should have been a *qui tam action*. 4 *Com. Dig.* Title "*Prohibition*." *J.* (c): and 12 *Rep.* 61. It is laid to the contempt of the king, and to the damage of the plaintiffs (below). Thirdly, at all events, the action should have been brought by the party grieved. *Fitzherbert* (d) says, the particular person, who is grieved, may sue forth the writ. And, commenting on the writ, "*de libertatibus allocandis* (e)," he observes that "those writs are of several forms, and may be sued by a body corporate, or by a single person, as the case shall happen." Now here the corporation of *London*, sued out the writ, and alleged a grievance to five particular persons, from whom the toll was demanded. Then even if the corporation might have sued out the writ, the individuals, who were injured, should have counted. Fourthly, The count ought to have stated by what description of citizens the exemption is claimed. *All* the citizens, whether resident or not, cannot be entitled to the exemption; *Waller v. Hanger*. 3 *Bulstr.* 1: It should have been claimed for the *resident citizens* only.

(a) 5 *Com. Dig.* 520. title "*Toll*." H.
1, 2.
(b) *Fitz. N. B.* 34.

(c) *Page* 481.
(d) *F. N. B.* 521.
(e) *F. N. B.* 520.

For the defendants in error it was contended, in answer to the first objection, that it appeared from the precedents of proceedings on this writ, as well as from analogy to other cases of a similar nature, that this was a *remedial* writ, on which an action might be maintained. In the Register 258. *b.* the writ, the alias, pluries, and attachment, are set out at length. The latter begins, as the writ in trespass, "*Si fecerit te securum &c, tunc pone &c.*" In *Ryl. Plac. Parl.* 13. the proceedings on this writ are stated, where an issue was directed on the action commenced on this writ. There is also another instance in *Madox's Firma Burgi* (a) of an action, which was supported on this writ. That indeed was a *qui tam* action; but it shews that this is the subject of *some* action, and furnishes a decisive answer to this objection. There are several other writs of the same nature with this, on which actions may be maintained, though the plaintiff be not injured; one of which is that of *monstraverunt*; between which and the present there is no difference. They resemble each other so strongly, that when the writ *de theolonio* is sued out by the tenants in ancient demesne, it is exactly like the *monstraverunt*: *Fitz. N. B.* 521. speaks of them both together. Neither the writ *de theolonio* or the *monstraverunt* is directed to the sheriff; there is an attachment in both; and it is admitted, by the passage from *Fitzherbert* (b), that in *monstraverunt* the parties may plead to issue. And in 2 *Inst.* 654, 5. there is a precedent of a judgment on that writ. The attachment in both is not for a contempt, but is process to bring the parties into court; and, having had that effect, it is *functus officio*; it need not appear on the record. What is said by *Ld. Ch. B. Comyns* is by no means conclusive that such an action as the present cannot be maintained: it does not follow that, because he says an action may be maintained for *taking toll*, no action lies for *demanding* it: and even if such were his opinion, it cannot be supported in opposition to the records stated in *Madox*, *Ryley*, and 2 *Inst.*; which also furnish an answer to the *dictum* of *Finch*. Neither is it necessary that the plaintiffs should have received an *actual injury* to entitle themselves to this action. In the precedent in the *Reg.* 258. no distress is stated either in the writ *de theolonio*, or in the attachment upon it. *Ld. Coke* (c), commenting on the writ of *mesne*, says "There be six writs in the law, that may be maintained *quia timet*, before any molestation, distress, or impleading;

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(a) Page 138.

(b) *F. N. B.* 34.(c) *Co. Lit.* 100. a.

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1. A writ of *mesne*, before he be distrained; 2d, *Warrantia chartæ*, before he be impleaded; 3d, A *monstraverunt*, before any distress or vexation, &c." And afterwards he proceeds thus; "It is to be known that there be two several judgments in a writ of *mesne*, one at common law, the other by the statute *Westm. 2. c. 9.* At the common law he shall have judgment to recover his acquittal; and if he be distrained or damnified, his damages and costs." So that if he sue before distress, he may have judgment to be quit; if a distress be taken, he may also recover damages. The writs *de theolonio*, *monstraverunt*, *ne injustè vexes* (a), and that *de warrantia chartæ* (b), are all analogous. They may be sued out merely for the purpose of bringing the question of right into dispute, without regard to any actual injury to the parties suing. *Fitzherbert*, in his comments on the writ *de warrantia chartæ*, says (c) "A man may sue forth this writ before he is impleaded in any action, but yet the writ doth suppose that he is impleaded: and if the defendant appear, and say that he is not impleaded, by that plea he confesseth the warranty, and the plaintiff shall have judgment to recover his warranty." *Hob. 21, 22, and 23*, speaks to the same effect. The truth or falsehood, therefore, of the allegation that the party is impleaded is so totally immaterial that the plaintiff may have judgment to recover his warranty, though he be not impleaded. So in the writ of *mesne*; *Fitzherbert* says (d) "And if a man bring a writ of *mesne* where he is not distrained, yet the writ is maintainable; but then he shall not recover damages, for the writ is brought only to recover the acquittal." And in *monstraverunt*, though only those who are injured recover damages, yet the other tenants may recover a judgment of acquittal. *Fitz. N. B. 35.* From all these authorities the principle is clear that these several writs may be sued out *quia timet*, before any actual injury is done, on which proceedings may be had; and the party complaining may recover a judgment on the right claimed, though before distress &c, he cannot recover damages. In the proceedings on the writs of *mesne* and *warrantia chartæ* the party alleges his being distrained or impleaded; yet the allegation is mere form, and the want of it is cured by a verdict. So in prohibition, the *gravamen* is the defendant's proceeding after the prohibition; the proceeding before is no ground of damage: but though it be so stated on the record in form, yet the pro-

(a) *F. N. B. 21. Reg. 4.*(b) *F. N. B. 310. 312.*(c) *F. N. B. 312.*(d) *F. N. B. 317.*

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ceeding after the prohibition issues is so immaterial that, whether true or false, the plaintiff may have a distinct judgment on the right on the same record on which the other party obtains a separate judgment as to the contempt. *Co. Ent.* 459. In *Stafford v. Neale* (a) it was held that the contempt was mere form, and that the jury need not give any verdict at all upon it.

Then in this case the question of right, as to the exemption claimed, is the only substantial question, which may be disposed of, though the question of form do not arise; and this defect in form is cured after verdict. In the precedent cited from 2 *Inst.* there is a separate judgment to be quit of toll, unconnected with the fact of demanding or taking the toll. The judgment in *Ryley* also shews that it is not necessary that a distress should actually have been taken; for at the conclusion of it the Court ordered the distress to be returned, *if any had been taken*: the same hypothetical judgment is given in other cases. In that judgment *no damages* were given, which shews that the action does not proceed on the ground that an actual injury has been sustained. And when damages are given, they do not go to the party, whose goods have been distrained, but to the body in whose right the action is brought. The objection that this count is drawn on the *pluries*, and not on the attachment, is not warranted by the terms of the record; from thence it does not so appear; neither the *pluries* or the attachment is on the record: the objection, therefore, at the most is only that there is no original writ; but that is cured by the 18 *Eliz. c. 14*. In answer to the second objection, the precedents in *Ryl.* on this very writ, and that in 2 *Inst.* on the writ of *monstraverunt*, which is analogous to it, shew that it is not necessary that this should have been a *qui tam* action: that in *Madox* was indeed such; but, considering all the authorities together, it may be either way; as in prohibition; *Rastl.* "Prohibition in Spiritual Court," *pl.* 3, 4, 5, 6, and 7. *Off. Brev.* 13. *Brow. Vade Mecum*, 549, 550. and *Co. Entr.* 453. *b.*; or as in actions for an escape on, or for a false return to, a *capias utlagatum*. *Barrett v. Winscombe*, 1 *Roll. Rep.* 78. *Cro. Jac.* 360. *S. C.* *Slipper v. Mason*, 1 *Lutw.* 121. *Brownl. Red.* 33. 1 *Brown. Entr.* 18. *Dawson v. The Sheriff of London*, 2 *Vent.* 84. *Rob. Entr.* 9. *Hern. Entr.* 167. 1 *Com. Dig.* 247. tit. "Action upon Statutes." *E. 2.* As to the third objection; the precedents cited shew that the action need not be brought by the party grieved. In that in *Ryl. Plac.*

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(a) 1 *Str.* 482.
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Parl. it was not pretended that the abbot's goods were taken; and yet he brought the action; it was laid *ad damnum ipsorum & hominum suorum*, and the judgment was that the abbot and all his men should go free. So in the precedent in 2 *Inst.* 655. the judgment was that all the tenants of the manor should be quit of toll. The action may be brought by those in whose favor the exemption is claimed. This is the privilege of the citizens of *London* in their corporate capacity; it is granted to them in that capacity, though to be enjoyed by the individual members of it. It is a corporate franchise, for any injury to which they, as a corporation, have a right to complain. And *Fitz.* 519. says "All the corporation may bring the writ by the name of the corporation." Then it was argued that, though the corporation may sue out the writ, the individuals, who are grieved, should count upon it: but one party cannot declare on a writ sued out by another. Neither is there any foundation for the fourth objection in this stage of the proceedings. The defendants in error claim this exemption for *all* the citizens; and if it had appeared on the trial that any particular class was not entitled to it, they must have failed in proving their allegation. But it is claimed in a general unqualified way, extending to all the citizens; and the verdict is co-extensive with their claim.

In the reply, it was said that the precedents cited rather confirmed than answered one part of the first objection; for they all alleged an actual injury done to the party complaining, and proceeded on the ground of a distress. In that in *Ryl.* (a) it was expressly stated that the defendants *distrixerunt abbatem et homines suos &c.*: This then was only an action of *trespass* for taking the toll. The next instance mentioned is also open to the same answer: *Madox* (b); in the text, gives an account of the action brought in 22 *Ed.* 1. for *taking* toll; in which he is warranted by the copy of the judgment which is inserted in the notes: the count alleges that the defendants *exigebant &c.*, which means *exacting*, not merely *requiring* or *demanding*, as in this case; and it afterwards proceeds "*et prædictos cives a tempore prædicti mandati regis eis directi majoribus distractionibus gravaverunt*" &c. The record cited from 2 *Inst.* was also in the case of a *distress* (c). The passage from *Co. Lit.* does not

prove

(a) *Ryl. Plac. Parl.* 13.

(b) *Mad. Fir. Burgi.*

(c) As the judgment only appears in 2 *Inst.* 654. the counsel for the plaintiffs in error examined the original record; by which it

clearly appeared that several distresses had been made. The defendants, Thomas de Hynkelye, and Roger de Mull, bailiffs of William de Brimingham of Brimingham, were attached to answer Richard de la Wythalle, Robert

prove that the party may *count* on the prohibitory writs there enumerated before he has sustained an injury: It only shews, what need not be disputed, that those *writs of prohibition may issue before distress*. And the judgment of acquittal, which he mentions in the next comment on the writ of *mesne*, must be taken to refer only to a case, where after the distress the tenant sued the lord. That the party cannot count even in the cases mentioned in *Co. Lit.* before he is injured is clear from all the precedents of proceedings on those writs. In *Rast. Ent.* 433, and 434, are several precedents on the writ of *mesne*, all of which allege a *distress*. So those on the *warrantia chartæ* state expressly that the party *was impleaded*; *Rast.* 397. b. 398, a; and *Co. Entr.* 691. So also does that in *Madox* on the writ of *monstraverunt*; which writ, *Fitzherbert* (a) says, was framed for the tenants in ancient demesne, who are *distraigned*. Again he says "In the writ of attachment he ought or may name all those tenants by their proper names which are *distraigned* after their prohibition delivered unto the lord." The precedents on the writ *ne injustè vexes* also state the *taking*. *Rast. Entr.* 437. b. Now all these different precedents in the several cases, so far from proving that the allegation that the party has actually sustained an injury is immaterial and mere form, shew the reverse; for there is no one instance in which it is omitted. Then the want of it is a ground of general demurrer; and, if so, it is a good objection on a writ of error. For the objection is, not that the party has *informally* stated his complaint, but that he has not stated in *substance* any injury at all, for which the law gives re-

Robert de Bisshoppehill, and John de Treur, men of the king of the manor of Brimsgrave and Norton, which is of ancient demesne of the crown of England. The count, after stating that by the custom of England the men &c. ought to be free of toll, alleged that the defendants on such a day distraigned them by three oxen for toll &c.; on which occasion the king ordered his writ of prohibition to them that they should not distrain the said men, and should release the distresses, if any they had; which writ was delivered to them on such a day; and of which the defendants took no notice, but on another day distraigned the same men by three horses at &c.; wherefore the king by another writ commanded them not to distrain, or signify to him &c.; which writ was delivered &c.; and which said last writ the defendants did not regard,

or signify to the king why they did so, but nevertheless on a certain other day the said defendants distraigned the aforesaid men by three hogs, wherefore the king, at the prosecution of the said men, commanded the defendants not to distrain the aforesaid men to pay toll in the said town &c., or to signify to the king why they had not or could not obey such his commands; which writ was delivered &c. But the defendants have not desisted from distraining the said men on such occasion, nor signified to the king why they had not obeyed his writ; in contempt of the king of 1000 l.; and to the damages of the said three men (by name) of 20 l. and thereof they bring suit, &c.

(a) *F. N. B.* 31. *F.*

(b) *F. N. B.* 33. *F.*

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drefs. The third objection also remains unanswered, as appears from the passages cited from *Fitzherbert*, and also from *Fitz.* 34. on the writ of *monstraverunt*; where he says "That writ (of attachment) shall be sued only in the name of those tenants, which are *again distrained* pending the suit, *and not in the name of them all, as the other writ is*": And afterwards he says that they may recover their damages severally. This is not like the case put by the other side of one party declaring on a writ sued out by another; for the plaintiff must count on the *attachment*, which should be sued out by the party grieved, though the writ of prohibition may be sued out by the corporation at large. With respect to the fourth objection; it being now admitted that the word "citizens" includes all the freemen, whether resident or not, the claim is against law, and therefore cannot be supported. 3 *Bulstr.* 1.

Lord KENYON, Ch. J. If this case were to depend entirely on the last topic, namely, whether the exemption claimed can extend to every citizen, whether resident or not, I confess I should have wished to consider that point more maturely before I gave my opinion, because it is a point of great importance. But as I have satisfied my mind that one (and the principal one) of the objections is well founded, I am not anxious to go through all the smaller ones. It is admitted that for near five centuries no such proceeding as the present has been instituted; but the subjects, who have had rights to assert, or had to complain of the undue exertion of the claims of others, have been content to have recourse to more modern proceedings in order to obtain redress: but the City of *London* have now thought proper (for reasons best known to themselves) to travel out of this ordinary course, not for the purpose of obtaining redress for any injury which they have actually suffered, but *merely to assert their claim*. Generally speaking, the object of the laws in civilized countries is to secure to every subject his rights, and to afford him protection when those rights are invaded; and that principle is founded in good sense. But this declaration does not complain of any injury having been done to any individuals; it only alleges that the defendants (below) *disquieted* the plaintiffs, and *required* of five citizens, by name, *certain tolls*, &c. Arguing *à priori*, in point of policy we should lean against such a proceeding as this. For if this action can be maintained against the corporation of *Lynn*, it may be equally supported against any individual in the kingdom for the most minute toll, such as a toll in a market &c.

&c. and it frequently happens that such tolls are in the hands of persons who are neither able or willing to dispute such a claim as the present. And though it is said (a) that a judgment of this sort is not to be followed up by costs, (upon which I am not prepared to give any opinion) yet the expences of a party's defending himself against such a claim as this would in many instances be more than adequate to the claim in dispute. In point of policy, therefore, it is to be wished that a party, who has done no act to enforce his claim, and who would rather abandon his right than dispute it, should not be dragged *nolens volens* into a court of justice to agitate speculative questions of right. But, if such be the law, it must be submitted to, however oppressive it may be to any bodies of men or to individuals. Then we must consider whether these proceedings can be supported by the precedents which have been cited on this very writ, or by arguments drawn from analogy to other proceedings of the same nature: For it is perfectly clear that they cannot be supported from the general analogy of the law, which does not permit any person to be impleaded for claiming rights which he does not assert. Now some precedents on this very writ have been cited; the first of which in point of time are those in the Register, which we are told is coeval with the law itself. It is not necessary to go through each of these; but the result from them all is, that they *complain of a damage* to the party, and in the subsequent proceedings on the writ uniformly state what the nature of that damage was. *Fitzherbert* (b) says, in commenting on this writ, "And upon that (namely, the writ) he may have an *alias*, and a *pluries*, and an *attachment*, if need be, against those who take the toll." Then two precedents were cited at the bar, the one from *Madox's Firma Burgi*, the other from *Ryl. Plac. Parl.*, which were urged as decisive authorities in favour of these proceedings: but a complete answer was given to those by the counsel for the plaintiffs in error, and it was shewn that in both an actual injury was complained of, for the parties complaining were *distrained*. The same observation applies to the writ *ne injustè vexes*; and to that of *monstraverunt*, of which it is said that, if after the writ sued out the lord *distrain the tenant*, the latter may proceed. The last authority, which was cited by the defendants in error, on the general question, was that in 1 *Inst.* 100. This struck me at first as worth further

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(b) F. N. B. 519.

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consideration (a) : but now I think it will not be found to govern this case. The opinion of Lord *Coke* arises in his comment on the text in *Littleton* ; who himself seems to have thought that, if the lord would not acquit the tenant, *but suffered him to be distrained*, the latter should have a writ of *mesne* against the lord and recover damages. The text therefore is confined to the case of an *actual damage* by distress : It is true indeed that Lord *Coke*, commenting on the writ of *mesne*, says that there are six writs in law, which may be maintained, *quia timet*, before any distress, or impleading. But I do not think that this passage breaks in upon the argument of the plaintiffs in error ; they do not object to the writ itself, but to the subsequent proceedings on it. Lord *Coke* does not say that the tenant may *count* on that writ, unless damage be done to him. But without determining that point, it is sufficient for us, in deciding on the writ *de theolonio*, to say that, however this may resemble the writ of *monstraverunt*, it is not that writ ; Neither is it classed by *Fitzherbert* under the same head, but is treated by him as a writ totally distinct from it. It is *sui nominis* at least, if not *sui generis*. And as Lord *Coke*, when he was enumerating all those writs in the passage alluded to, omitted this, why are we to insert it under that class ? If indeed this had been a writ extremely beneficial to the subject, and if the same reasons, which applied to those writs, also extended to this, we should perhaps have held that the proceedings on the one were applicable to the other. These are the grounds which influence my judgment strongly against these proceedings. In the first place, it is against the general principles of the law, that a party, who has not received any injury, should compel another to answer him in a court of justice. In the next place, it is also against policy ; for the reasons I have mentioned. And lastly these proceedings are not warranted by the precedents with respect to this writ itself ; but, they are directly contrary to the form of every proceeding of this kind which is to be found from the earliest times down to the present moment. And when we are driven to the precedents mentioned by Lord *Coke*, it is sufficient to say that this is not one of them ; and perhaps, on a further investigation, many reasons might occur to shew that this should not be included under those. There is a very strong reason why the party may sue the *warrantia chartæ* before he is impleaded, namely, to bind the lands of the vouchee which he has at the time of suing out the writ. That is a substantial reason why

(a) This was not cited on the first argument.

that

that particular writ should be issued *quia timet*; but it cannot extend to this case; and there appears to be no fair reason why these proceedings should be supported. The plaintiffs ought to be satisfied, if the law be prompt to give them redress when their rights are invaded. These points do not appear to have been much canvassed in the court of Common Pleas; and therefore we have less reluctance in delivering it as our opinion now, without further consideration, that the judgment ought to be reversed.

ASHHURST, J. Though several cases have been mentioned on this (second) argument, which I had no opportunity of considering before I came into court, yet they do not shake the opinion which I before entertained. It is a general principle of law, that, in order to found an action, there must be *damnum cum injuria*, except in some few particular cases; and the defendants in error have not shewn that this is one of those. In the present case it is not pretended that the parties have at present sustained any actual damage: No injury is stated in the declaration; and though damages were given at the trial, they have been since remitted. This action proceeds merely on the ground that the city of London have been *threatened* to be distrained for toll; but I think that it cannot be maintained; it is sufficient that the law of this country has provided a remedy for the subjects when they actually receive an injury. In this case the action is brought by the corporation at large, and not by the individuals; whereas the injury (if any) must have been sustained by the individuals. The corporation cannot be injured *quæ* corporation: but in truth no injury whatever is stated to have been sustained even by the individual members of it. This case therefore falls within the general rule, that there has been no *damnum*; and we ought not to make a new exception, at least in a case like the present. The opinion of *Finch* is extremely strong against this proceeding. It is observable too that Lord *Coke*, when he was enumerating the several *anomalies*, or exceptions to the general rule, does not mention this writ. And the precedents cited from *Ryley* and *Madox* are clearly distinguishable from the present case, for the reasons already given; they both state an actual injury.

BULLER, J. It is admitted that no proceeding like the present has been heard of for near five centuries; and I do not see for what useful purpose the corporation of London have thought proper to have recourse to it now. I cannot suggest any reason for it, except it be done with a view of preventing a jury from

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from exercising their judgment on the question of right on any future occasion: If any such were the intention, they cannot expect that this Court will lean in favor of such a proceeding. The first ground, on which the defendants in error have attempted to support these proceedings, are the precedents: but, without going through them minutely, it is sufficient to say that there is no authority for the present action; they are all distinguishable from this case, inasmuch as they all state an actual distress. Then it was said that this was the same as the writ of *monstraverunt*: but no authority has been cited to prove it; and *Fitzherbert* treats of them distinctly, under different chapters, as if they were different writs; and he says expressly that the party may declare on the latter, without saying that he may on the former. Then it was urged that in *monstraverunt* the corporation at large may declare: but how is that established; *Fitzherbert* in every instance (except one) states that there must be an actual distress in order that the attachment may issue, and that it must be stated to the damage of the persons suing; and in that one (a) passage, he says, "if any be compelled to pay toll, all the corporation may bring the writ." But even this fortifies the first objection, that the toll must be taken: and though he says that the writ may be sued out by all the corporation, yet he does not say that they may all maintain the action; so that all the passages may be reconciled. The attachments spoken of in *Fitzherbert* were of two sorts; one was in the nature of a criminal proceeding, for a contempt in having disobeyed the king's writ; and that might be sued by all the corporation; the other was to bring the parties into court to answer in an action. And it is clear that the attachment, which *Fitzherbert* mentions in the last passage, was the criminal attachment for the contempt; on which no further proceedings could be had. There is a precedent in Lord Hale's manuscripts (b), which clearly shews the distinction between the different attachments. "*East. 1 Ed. 2. Suffex. Præceptum fuit ballivis Willielmi de Brewosa de Shoreham, quod desisterent capere theolonium ab episcopo Cicestriae & hominibus suis, juxta cartam domini regis Henrici, proavi regis nunc, per quam quieti esse debent per totum regnum; qui, post diversa brevia eis missa, tam de prohibitionem quam ad respondendum, retornaverunt quod nunquam tempore*

(a) F. N. B. 519. E.

(b) Mr. J. Buller observed that this was an extract from a MSS. of Lord Hale's in

Lincoln's-Inn Library, containing "*Placita coram Rege*," from the 1st to the 22 Ed. 2.

regis nunc aliquod breve eis directum fuit, et quod *distinctionem captam* super homines dicti episcopi sine exheredatione domini sui deliberare non possunt eo quod ipse Willielmus et antecessores sui a tempore quo &c, hucusque seifiti fuerunt de theolonio hominum dicti episcopi, & predecessorum suorum, non obstante cartâ domini regis Henrici prædicti. *Et quia retorum prædictum sonat in contemptum* domini regis, et dicti episcopi et hominum suorum prædictorum dispendium, ideo præceptum esto vicecomiti quod attachiet eos, &c." That therefore was clearly a criminal attachment; and an arbitrary proceeding it was; for there was a good legal return to it. Then let us see whether there be not something further, which shews that that was not an action, at least by the persons grieved. The persons grieved were the bishop of *Chichester* or his men: but no precedent can be found to shew that *all a person's tenants*, as such, can stand in judgment in a court of law. And if any action had been brought in that case, it must have been by the bishop or the person whose goods were actually seised. And therefore though civil proceedings may be instituted on a writ founded originally on the prohibitory writ, yet that writ, whatever it be, which brings the parties into court, must be considered as the original writ in the cause; it must be founded on *damage* actually done, and must be sued out by the party actually grieved. It is stated in the books that the attachment, sued out by the party grieved, is that writ; the foundation of the action, on that the plaintiffs proceed; and count, according to *Fitzherbert*. Then it was contended that the party may have this writ before distress, for which a marginal note in *Fitz.* (a) was relied on: but those marginal notes do not deserve much attention; they were not made by *Fitzherbert*; and in the old editions those notes are not added. But even supposing that the writ of *monstraverunt* might have been sued out before distress, it does not follow that this writ may. The counsel for the defendants in error then relied on *Coke's* comment on *Littleton*; but on examination it will not be found to apply. The text in *Littleton*, on which Lord *Coke* was commenting, is this; "and if he (the lord) doth not acquit him (the tenant,) *but suffereth him to be distrained* &c, he shall have against his lord a writ of mesne, and shall recover against him his damages &c"; the text therefore is confined to a writ of mesne, and to the case of a distress. Lord *Coke* does not comment on the section at large; but he comments, in his usual manner, first on one part of it,

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and then on another. In the course of his note on the writ of *mesne*, he enumerates other writs of prevention, of which the writ in question is not one: Then having dismissed those writs of prevention, he takes up the comment again on another part of the text, which applies only to the writ of *mesne*: this is (at it were) a new head, or chapter; and what he says respecting the *judgment of acquittal* is only applicable to the *writ of mesne*.

On the last point, which was argued at the bar, I think we are bound to give some opinion; and it cannot have escaped the attention of the counsel for the city of *London*, how very material it is to their case. The printed report of this case refers to a MSS. of Lord *Hale*, published by *Hargrave* (a), in which it is said, "*bona civium* must not be intended of every freeman of *London*; but first, he must be a freeman of *London*; secondly, he must be a *freeman and inhabitant* of *London*; for though he be a freeman, yet if he inhabit out of *London*, he shall not be exempted from prisage even for the wines imported into *London*." The answer, which the counsel for the defendants in error have given to this objection, is, that this is a question of fact, which the jury have determined: but I think it involves in it a question of law as well as of fact. The objection arises on the record; for it is contended by the counsel for the city that the word *citizens* includes all freemen, whether resident or not: if it do, such a custom cannot exist in point of law. 3 *Bulstr.* 1. *Thomf. Entr.* 302. 30 *Ed.* 3. *fo.* 16. and *Robinson v. Marshall. C. B.* lately. If such a custom could be supported, it might be attended with the most serious consequences; since it would be in the power of the city of *London*, which is one of the oldest corporations in the kingdom, to sell the privileges of every other corporation.

GROSE, J. After the very elaborate discussion of this case, I might excuse myself from going through it again: but as I have conceived a strong opinion in favor of the plaintiffs in error, I will just mention the general grounds of it. The principal question is, whether or not sufficient appear on the count, to enable the plaintiffs to recover a judgment. Now that count, as it has been observed already, undoubtedly states no damage, no specific injury to any person whomsoever. It is the policy of the law to give redress to those only who are grieved: and all the precedents in our books state not only that the party complaining has sustained an injury, but the manner also in which he has sustained it. The plaintiffs themselves in this case confi-

(a) *Hargr. Law Tracts*, 128.

dered that that was necessary, because they alleged in their count that it was *to the damage of the plaintiffs*; and damages were even given at the trial, though they were afterwards remitted. The arguments of the defendants in error are drawn, first, from analogy to other cases, and next from the precedents; but not from principles of reason or policy. As to the first, I think there is a strong analogy between this writ and that of *monstraverunt*. The latter was brought by the tenants in ancient demesne, in order (amongst other things) to be quit of toll; and it only takes its name from one of the Latin words used in the writ. *Finch* indeed considered this only as a prohibitory writ; in this I differ from him; I consider it as a remedial as well as a prohibitory writ. In the first instance it is to prohibit the party to take the toll from those who claim the exemption; and on that prohibition not being attended to comes the attachment, which is the remedial part of the writ; and under it those who have suffered by the disobedience of the former writ may recover damages. Then if there be this analogy between this writ and the *monstraverunt*, it will appear from all the writers on this subject (except Lord *Coke*,) that these proceedings cannot be supported. *Fitzherbert*, commenting on the *monstraverunt*, says, if the lord distrain, then the tenants may sue an attachment and recover their damages; and in page 34. he says, "the plaintiffs in the writ of attachment may count severally, and recover several damages: but they may count together in one count, and declare how they were severally *distrained &c.*" But throughout the whole comment there is not a single passage, which does not consider the proceedings upon the attachment as founded upon a grievance actually sustained by the party suing. So in his comment on the writ *de theolonio*, he says, "the party may have an attachment against the bailiffs, or those that do grieve him, &c." The general principle therefore to be collected is that on both these writs the party grieved may count. The precedents too, which have been cited, all agree with this; they all state an actual grievance. In one, which was not alluded to at the bar, *Lib. Intrat.* 97. it is expressly stated in the count in *monstraverunt* that the defendant *distrinxit*; so do those in *Ryley*, *Madox*, and 2 *Inst.* In that in *Ryley* it is observable that there was a claim of exemption from *all tolls*; and yet as the parties afterwards insisted on an exemption from some in particular only, there was a judgment for those parts. In the one in *Madox*, there was not only a distress, but an avowry on it. So also in 2 *Inst.* a distress

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was stated; and a judgment given for 20 marks, and an inhibition to the defendants not to distrain again. In addition to these cases, which were all cited on the first argument, a passage from *Co. Lit.* has been cited this day: but, after giving it the best consideration, I continue of the same opinion that I held before. Notwithstanding Lord *Coke's* opinion is always of considerable authority, yet it has been sometimes doubted in particular instances; and in this his comment is totally different from the text. *Littleton* was only speaking of a distress: and if what Lord *Coke* says relative to the judgment of acquittal were meant to apply to any other writ than that of mesne, which was the subject before him, he is certainly mistaken; it is merely an opinion of his own, not supported by any authority, and it is contradicted by those of *Finch* and *Fitzherbert*, and by all the precedents in the law books. On the whole, therefore, I am of opinion that the plaintiffs have not alleged any real injury in their count, and consequently cannot recover a judgment. I think it is not necessary to give any opinion on the last point made at the bar, because this is sufficient to reverse the judgment in the Common Pleas. At the same time I must make one observation respecting the claim stated in the declaration. I believe it has been decided that the word "citizens" *ex vi termini* means *resident citizens*: however I do not wish to give any decided opinion on this point.

Judgment reversed.

Lord KENYON, Ch. J. then mentioned the case of *R. v. Ponsonby (a)*, in which Mr. *Henley*, who was then at the bar, considered it as ridiculous and absurd that a *quo warranto* information could be granted for a mere claim; and Lord Ch. J. *Ryder*, in delivering the opinion of the Court, adopted the opinion of Mr. *Henley*, and said that no information could be granted in such a case, because no injury was done either to the crown or to the subject.

(a) *Vid. Say. 245; and 5 Bro. Parl. Cas. 287.*

RAVEE against FARMER.

An award
made upon a
reference of
all matters in
difference be-
tween the

parties does not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject matter of such action was not laid before the arbitrators, nor included in the matters referred.

THIS was an action for money had and received to recover the proceeds of eighteen bags of red *Dutch* clover. The defendant pleaded, *inter alia*, an award; to which the plain-

tiff

tiff replied that the subject matter of the present action was not included in the reference, &c; on which issue was joined. At the first trial before Lord *Kenyon*, at the Sittings after *Easter* term last at *Guildhall*, the plaintiff called one of the two arbitrators to whom the matter had been referred to prove that this matter had never been laid before them by the parties, and that they had not taken it into their consideration, in forming their award; but the defendant's counsel objecting to evidence of this nature on the ground that the submission to arbitration included all matters in difference between the parties, his Lordship thought he was bound by the terms of the reference, and rejected the witness; upon which the plaintiff was non-suited. *The Court* however in *Trinity* term last, upon application, set aside the non-suit; Mr. Justice *Buller* referring to a case in point determined by this Court in the time of Lord *Mansfield* (a); and upon the cause going down to trial again before Lord *Kenyon*, the witness was admitted, and the plaintiff obtained the verdict.

A motion was this day made on behalf of the defendant for setting aside the verdict, and granting a new trial, on the ground that the terms of the reference, being of *all matters in difference*, was conclusive on the parties as to all causes of action subsisting between them prior to the submission, of which the subject matter of the present action was one. But by

BULLER, J. There is no colour for the motion. The plaintiff may undoubtedly shew that this matter was not in difference between him and the defendant at the time of the submission, nor referred by them to the arbitrators.

Per Curiam,

Rule refused.

(a) The case alluded to was *Golightly v. Jellicoe*, Hil. 9 Geo. 3. B. R. In an action of covenant the defendant took issue on all the breaches; secondly, pleaded a general release, and that those breaches were before the release made: and, thirdly, that an action for some other matter was brought by the plaintiff in Mich. 8 Geo. 3. and *all matters in difference referred*; that the arbitrator ordered several sums to be paid, and that the parties should give ge-

neral releases; and that the defendant did pay the money, and the releases were given. The plaintiff replied that these matters were not before the arbitrator; to which the defendant demurred. After argument, Lord *Mansfield*, Ch. J. said, the only question is, whether a submission of *all matters in difference* is a submission of matters *not in difference*.

Et per Curiam,

Judgment for the plaintiff.

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Tuesday,
Feb. 11th.

Three days
grace are al-
lowed on
promissory
notes as well
as on bills of
exchange;
for the 3 &
4 *Ann. c. 9.*
puts them
both on the
same footing
in all re-
spects.

BROWN *against* HARRADEN.

THIS was an action on a promissory note by the indorsee against the indorser. The declaration stated that *W. German* on the 15th of *September* 1789 made the note in question for 20*l.* payable to the defendant or order on the 2d of *November*; it then deduced a title to the plaintiff, and averred a refusal to pay by the defendant on the 2d of *November*. The defendant pleaded a tender on the 5th of *November*. The plaintiff replied that he sued out a bill of *Middlesex* on the fourth of *November*, and that the defendant did not at any time before that day tender the 20*l.* &c. Rejoinder that the bill of *Middlesex* was sued out on the fourth of *November*, and that before that time the defendant was not by force of the statute liable to pay &c., nor did he promise to pay before &c. Surrejoinder, that he did become liable by force of the statute before the suing out of the bill of *Middlesex*, and promised &c. To this there was a general demurrer; and joinder.

Holroyd, in support of the demurrer, said, that the sole question was, whether or not three days grace were allowed on promissory notes as well as on bills of exchange; he contended that they were; and consequently that payment could not be enforced in a court of law till the expiration of those three days. The object of the Legislature in passing the 3 & 4 *Ann. c. 9.* was to put promissory notes on the same footing with bills of exchange in every respect; as is evident from the words of the statute (a), and the several determinations upon it. *Welch v. Craig*, 8 *Mod.* 373. *Heylin and Others v. Adamson*, 2 *Burr.* 676; *Grant v. Vaughan*.

(a) "An act for giving like remedy upon promissory notes as is now used upon bills of exchange, and for the better payment of inland bills of exchange."

It recites that promissory notes are not assignable or indorsable over, within the custom of merchants, to any other person; and that neither the payee or indorsee can maintain an action, by the custom of merchants, against the maker, "Therefore, to the intent to encourage trade and commerce, which will be much advanced, if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner; be it enacted, &c., that such note payable to any person or persons, body politic or corporate, his, her, or their order, shall be assignable or indorsable over, in the

same manner as inland bills of exchange are, or may be, according to the custom of merchants; and that the payee may maintain an action for the same, in such manner as he, she, or they, may do, upon any inland bill of exchange made, or drawn according to the custom of merchants, against the person or persons, body politic, and corporate, who, or whose servant or agent as aforesaid, signed the same; and that any indorsee &c., may maintain his, her, or their action for such sum of money, either against the person or persons, body politic and corporate, who, or whose servant or agent as aforesaid, signed such note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange, &c.

3 *Burr.* 1524; 1527; *Rawlinson v. Stone*, in error. 3 *Wils.* 3, 4. *Bull. N. P.* 277; & 2 *Bl. Com.* 469, 470. Now if the three days grace be not allowed on promissory notes as well as on bills of exchange, the holder cannot sue and recover on them *in like manner* as on bills of exchange; for in one instance he would have a right of action three days sooner than in the other. And it is on the ground of this similitude that promissory notes, payable on a contingency, or out of a particular fund, have been held not to be negotiable, as not coming within the meaning of the statute of *Anne*, though they come within the words of it, because they could not be put on the same footing as bills of exchange. An argument may also be drawn from the stat. 17 *Geo.* 3. c. 20. §. 1. which considers bills of exchange and promissory notes on the same footing; it makes the same regulations with respect to both, and (among others) enacts that those, which are of less value than 5*l.* shall be made payable within 21 days. But, independently of the statute of *Anne*, the *indorsement* of a promissory note of itself constitutes a bill of exchange, as falling within the same definition, namely, a request by one to another to pay to a third person. No particular words are necessary to constitute a bill of exchange; a request to deliver money to another is sufficient, 2 *Lord Raym.* 1397. Neither need the direction to pay the money be in the body of the note, or even on the same side of the paper. *Marius* 34. In the preamble to the statute of *Anne*, it is taken for granted that the holder of a promissory note might bring his action against the *indorser*, as on a bill of exchange, though he could not against the *maker*. And *Holt* Ch. J. seemed to be of that opinion in *Buller v. Cripps*, 6 *Mod.* 29, 30.; and in *Tassell v. Lewis* *Lord Raym.* 744. Now if such an action could have been maintained before the statute of *Anne*, as on a bill of exchange, the three days grace must have been allowed. In the case of *Tindal v. Brown* (a), which was argued several times in this Court, and afterwards in the exchequer chamber, it was considered as settled both by the bench and the bar that three days grace were allowed on promissory notes; for the whole argument was founded on that assumption: if that had not been admitted on all sides, no question at all could have arisen; for if they were not allowed, there would indisputably have been laches in the holder. It is true indeed that in *Dexlaux v. Hood* (b), *Denison*, J. said, that they were not allowed in promissory notes: but his opinion was clearly extrajudicial, because the

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party had at all events been guilty of laches in not giving notice till after 11 days; and it appears from what the jury said in that case that the practice was against the judge's opinion: it is observable also that a *quære* is added in the margin of that case; the law on this subject was not so well understood then as it has been since; and it is contradicted by the reasoning in *Tindal v. Brown*. There is also a short note of a case in *Fort. 376, May v. Cooper*, where it is said to have been determined that the three days are not allowed in these cases: but the same answer may be given to this, as to the preceding, case; and it has never been mentioned in any of the subsequent cases. But though this question do not appear to have ever been solemnly decided, in point of fact the Bank of *England* (a), the bankers, and the principal merchants in the city, always make allowance for the three days in discounting. Now if this should be determined to be illegal, they will all have incurred the penalties of usury; and numberless questions will arise on notes which have been paid by indorsers in default of payment by the makers, on the ground that the holders have not used due diligence.

Lawes, contra. No action could have been brought either against the maker or the indorser of a promissory note before the statute of *Anne*, because a note was merely evidence of a debt; and no action could be framed on it, without disclosing some consideration, *Clerke v. Martin*, 2 *Ld. Raym.* 757; *Williams v. Cutting*, *ib.* 825; and *Pottet v. Pearson*, *Salk.* 129. It was on the ground that the courts of law uniformly held that promissory notes could not be declared on as bills of exchange, that the merchants applied to the Legislature, in consequence of which the statute of *Anne* was passed. But that statute does not put notes promissory and bills of exchange on the same footing *in all respects*: the inconvenience complained of, and which was intended to be remedied, as appears from the prior decisions and from the preamble of the statute, was the inability to sue on promissory notes; and that statute only gave a right *to bring actions upon them* in like manner as on bills of exchange, without altering the law as to the *time* or the *manner* of their being paid. It is said by *Beawes* and all the writers on this subject that three days grace are allowed on bills of exchange: but they take no notice of any such indulgence with respect to promissory

(a) In this he was confirmed by Mr. Kay, Solicitor for the Bank, on a question put to | him from the Court.
(b) 1 *Ld. Raym.* 743.

notes; from whence it is fair to infer that in their opinions the latter are not entitled to the three days grace. And Lord *Holt* (a) even doubted whether the custom extended to inland bills of exchange. There is no case, in which it has been expressly decided that the three days grace are allowed on promissory notes: whereas there is a direct authority to the contrary in *May v. Cooper* (b), which on searching the record appears to have come before the Court on demurrer; and there is also a *nisi prius* decision in *Dexlaux v. Hood* to the same effect. With respect to the case of *Tindal v. Brown*, this point did not arise in it; it was not made at the bar, or noticed by the bench. And as to the other cases cited by the defendant's counsel; they only prove that there is a similitude between bills of exchange and promissory notes in other respects, but do not shew that they are alike in this. And there may be some reasons why that indulgence should be allowed on bills of exchange, which do not extend to promissory notes; one of which is that the acceptor, who engaged to pay to the holder a debt for the drawer, may have an opportunity of examining his accounts before he pays the bill.

Lord KENYON, Ch. J. This question is of such infinite importance in every hour's transaction in the commercial world, that (I think) we should not discharge our duty to the Public, if we were to keep this matter in suspense: And we are the more ready to deliver our opinion as this question is upon the record; for if our judgment be erroneous, it may be corrected by a superior tribunal. It is not necessary now to consider whether or not Lord *Holt* were right in so pertinaciously adhering to his opinion before the statute of *Anne*, that no action could be maintained on promissory notes, as instruments, but that they were only to be considered as evidence of the debt: that question exercised the judgments of the able men at that time; but the authority which his opinion had in *Westminster Hall* made others yield to him; and it was thought necessary to resort to the Legislature to apply a remedy. It is extremely clear that on *foreign* bills of exchange three days grace are allowed; I think it is as little to be doubted that they are also allowed on *inland* bills; and that observation is of some use as applicable to some of the authorities which have been cited. It is not too much to say that in former times, recently after the passing of the statute of *Anne*, these kind of questions were not

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so well understood as they have been since; the judges were not so conversant with the subject; but they have now raised a system to answer the exigencies of the Public, without departing from the rules of law. But when it is stated in Lord *Raym.* 743. that there was no certain time assigned by the custom of merchants for the payment of inland bills of exchange, it only shews that the judges were very cautious on the subject: but now it has been settled for more than half a century that they are payable at the same time as *foreign* bills of exchange. Then it has been argued that there is a substantial difference between bills of exchange and promissory notes; and that there are reasons why the acceptor of the one should be allowed more time than the maker of the other: but, I confess I see no difference whatever; they both make engagements of the same nature, and when the acceptor has accepted a bill, he is equally bound to be prepared to pay on the day appointed as the maker of the promissory note.

Then the ground, on which our judgment must proceed, is the statute of *Anne*; since which the holder of a promissory note may declare upon it according to the form of the statute, though not according to the custom of merchants. The words of the preamble ought to decide the question, which the common usage of mankind has since put into a state of repose. It recites that promissory notes were not assignable or indorsable within the custom of merchants, and that the indorsee could not maintain any action upon them, within the custom of merchants; "therefore, to the intent to encourage trade and commerce, which will be much advanced *if such notes shall have the same effect as bills of exchange*, and shall be negotiated in like manner &c," it is enacted &c. The struggle between the merchants and the courts of law before this statute was, whether the party could declare on these notes according to the custom of merchants; Lord *Holt* thought not: but this statute, which was passed at the instance of the merchants, has made them that which they were not before; and they are now, with the assistance of the statute, acted upon as if they had been within the custom of merchants. The operative part of the statute proceeds to say that such "notes shall be assignable and indorsable over *in the same manner as inland bills of exchange*"; that the holders may maintain actions on them *in such manner as they might upon inland bills of exchange* against the makers, or against the indorsees, *in like manner as in cases of inland bills of exchange* &c. In short, they were

were wholly to assume the shape of inland bills of exchange. The case cited from *Fortescue*, indeed, is undoubtedly against our opinion: but that case was determined when the doctrine on paper-currency was not so well established as it has been since, and it has been constantly contradicted by the uniform practice to this time, and by the courts of law. The case of *Tindal v. Brown* is, in my opinion, very important: that case was argued several times in this court, and afterwards in the Exchequer Chamber; but this question was not even raised, though it would have been decisive, if well founded; and it was taken for granted in all the different stages of that cause that the laches of the holder did not commence until the expiration of the three days grace. Therefore on the act of parliament, and on the authorities, I think we are warranted in deciding that the three days grace ought to be allowed on promissory notes as well as on bills of exchange, and consequently that the tender made by the defendant in this case is a sufficient answer to the plaintiff's action. In addition to these considerations we are now told that it has been the constant practice at the Bank, and at the principal bankers, to make this allowance on promissory notes. Then if we were to make a decision in opposition to all this practice, it would be attended with the most serious consequences; for these notes are circulated not only throughout this country, but also over several other countries in *Europe*: many of them have been discounted, and interest taken, on the supposition that three days grace are allowed: but, if we were to determine that no such allowance ought to have been made, all those parties would be involved in the crime of usury; and again all holders of notes, who made no demand on the makers till the expiration of the three days, and who afterwards resorted to the indorsers, will have been guilty of laches. Therefore I am glad to find that the later judicial determinations, and the statute of *Anne*, which was passed for the purpose of putting promissory notes on the same footing with bills of exchange, warrant the practice which has obtained in this respect, notwithstanding the former cases seem to be against it.

ASHHURST, J. I am glad that this case is brought before the Court in order to be solemnly determined; though I confess it is a matter of astonishment to me that this question could ever have admitted a doubt since the statute of *Anne*, which was passed in order to put promissory notes on the same footing with bills of exchange in all respects. The preamble of that act declares
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that, for certain reasons there mentioned, both ought to be put on the same footing; and the enacting part says that actions may be brought on the one *in the same manner* as on the other. Now if they were to differ in so essential a point as that now contended for by the plaintiff, they could not be said to be put on the same footing; nor could actions be brought on promissory notes *in the same manner* as on bills of exchange, if actions on the former might be commenced three days sooner than on the latter. And it happens very fortunately that, in putting this construction on the statute of *Anne*, our opinion will meet the general concurrence of mankind.

BULLER, J. The question, whether three days grace shall or shall not be allowed on promissory notes, has for many years past been *vexata questio* in *Westminster Hall*: But the practice among merchants and bankers has been uniform in favor of the indulgence. The doubt, which has arisen in our own time, has been principally founded on the determination of Mr. J. *Denison* at *nisi prius*; though it appears that the jury there said that the judge's opinion was against the practice: And that case has always been handed down in print with a *quære*. And since I have sat upon the bench, I have always held at *nisi prius* that the three days are allowed, whether the question has arisen on the supposed laches of the holder, or in cases of usury. The cases cited by the defendants' counsel are extremely material; for though they do not directly decide the question, they shew that the courts of *Westminster* have thought the analogy between bills of exchange and promissory notes so strong, that the rules established with respect to one ought also to prevail as to the other. Such is the general tendency of all the cases since Lord *Mansfield's* time. Many of the cases, alluded to by the plaintiff's counsel, happened before the statute of *Anne*; they only shew the strong disposition which Lord *Holt* manifested on all occasions to discourage promissory notes. It appears from them that Lord *Holt* and the merchants were perpetually disputing whether or not they should be put on the same footing with bills of exchange. The merchants did not contend that they might recover on notes in *particular cases* only, but that notes should be *universally* considered in the same light as bills of exchange. Upon that ground they applied to the Legislature for relief; and their conduct is very strong to shew what construction the statute of *Anne* ought to receive. The language of the preamble is express that it was the object of the
Legislature

Legislature to put promissory notes exactly on the same footing with inland bills of exchange; and the enacting part pursues that intention. Therefore though it has been now attempted to make a distinction between bills of exchange and promissory notes, and to shew that the former only are beneficial to trade and commerce, yet that argument is not now open, for the Legislature have said directly the reverse, and that it is for the benefit of commerce that they should be on the same footing. The other cases, cited by the plaintiff's counsel, shew how little the law on this subject was formerly understood: But whenever these kind of cases have been discussed of late years, the judges have all agreed that it is essential to the welfare of the trade and commerce of the country that some certain rules should be established to govern all cases in future. With regard to the custom of merchants; it is true that a party cannot declare on notes on the custom, but he may declare on the statute, which shews that the act of parliament has been considered in the courts of law as putting them on the same footing with bills of exchange.

GROSE, J. On reading the words of the statute of *Anne*, I have no doubt whatever but that to this purpose notes are put exactly on the same footing with bills of exchange. It is also of great importance to consider that the contemporaneous usage and the modern practice agree with this construction; and therefore it would be attended with the most mischievous consequences, if we were now to put a different construction on it. The late cases, *Heylin v. Adamson*, *Grant v. Vaughan*, and *Tindal v. Brown*, though not precisely in point, are strong to shew that the law is as it has been now declared to be. The case of *May v. Cooper* is indeed strong the other way: but that case cannot be supported; the true answer to it is that when it was determined these commercial subjects were not so well investigated, nor consequently so well understood, as they are at this time. And it is very probable that Mr. J. *Denison* formed his opinion in *Dexlaux v. Hood* on that of *May v. Cooper*: but he was misled by it. Therefore on the general reasoning of the cases cited by the defendant's counsel, and on the clear and evident intention of the Legislature in passing the statute of *Anne*, I am of opinion that the three days grace ought to be allowed on promissory notes as well as on bills of exchange.

Judgment for the defendant.

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A plea of bankruptcy given by the 5 G. 2. c. 30. §. 7. must state that the *cause of action* accrued before the bankruptcy: stating that an *indenture*, on which an action of covenant is founded, was executed prior to the bankruptcy is not sufficient.

CHARLTON *against* JOSEPH KING.

THIS was an action of covenant. The declaration stated an indenture dated *October* 6th 1785, between one *James King* of the one part, and the plaintiff and the defendant of the other; in which (after reciting that *James King* and the defendant had been partners, and that they had agreed to take the plaintiff into partnership for seven years, in consideration of his advancing 500*l.* *James King* and the defendant covenanted jointly and severally to repay the plaintiff the 500*l.* so advanced by him at the expiration or other sooner determination of the partnership, in manner following, namely, one moiety on the *Candlemas-day* and the other moiety on the *May-day* next following the determination of the partnership, with lawful interest from those respective days until the same should be paid. The declaration then averred that the partnership was afterwards determined, to wit, in *March* 1787; and that neither *James King* or the defendant had repaid the 500*l.* at the times agreed upon &c. The defendant pleaded several pleas, among which was the following; That the defendant before the exhibiting of the bill of the plaintiff, to wit &c, became and was a bankrupt within the intent and meaning of the several statutes made and now in force concerning bankrupts; and that the said indenture in the said declaration was made before such time as the said defendant so became a bankrupt; concluding to the country.

To this there was a special demurrer, because it was not alleged that the *cause of action* accrued before the bankruptcy of the defendant, and joinder in demurrer.

Lawes, in support of the demurrer, insisted that this plea could not be supported; inasmuch as it did not pursue the form prescribed by the stat. 5 *Geo.* 2. c. 30. §. 7; which enables a bankrupt who is sued, to plead that the *cause of action* arose before the bankruptcy. And that it was clearly bad, if not warranted by the statute.

Holroyd, contra. This debt might have been proved under the commission by the 7 *Geo.* 1. c. 31. But the defendant could not in strictness plead that the *cause of action* accrued before the bankruptcy, though the *indenture* were executed before; because it was the bankruptcy which put an end to the partnership. But

Per

Per curiam. This plea cannot be supported, considered in any point of view. In the first place, it is bad as a plea at common law; and in the next, it is not warranted by the statute, which has prescribed a particular form of plea. But as this was a certain sum of money payable at all events on a future day, the plaintiff might have proved it under the commission with a rebate of interest; and as the statute has given the defendant a right to plead generally that the cause of action arose before the bankruptcy, he is entitled to prove this defence on a plea (a) that the cause of action arose before the bankruptcy.

Judgment for the plaintiff on this plea.

(a) One of the pleas was in this form.

MOREWOOD *against* WOOD and Another.

TRESPASS for breaking and entering the plaintiff's close, called *Swanwick Common*, otherwise *Swanwick Delves*, in the parish of *Alfreton, Derby*, and digging stones therein &c, and carrying them away &c. Plea, that there are certain wastes or commons lying open to one another, one called *Swanwick Common* otherwise *Swanwick Delves*, being the close in which &c, the other called *Swanwick Green*, in *Alfreton* &c; that one of the defendants was seised in fee of certain tenements in *Alfreton*, in right of which he prescribed for the liberty of digging stones in upon and throughout the said closes called *Swanwick Common*, otherwise *Swanwick Delves*, and *Swanwick Green*, for repairs &c; and that he, (his tenements wanting repairs,) in his own right, and the other defendant, as his servant, entered &c. for that purpose. Replication, traversing the prescription in *Swanwick Common*, otherwise *Swanwick Delves*; dropping *Swanwick Green*. Rejoinder, tendering issue on the prescription both in *Swanwick Common* and *Swanwick Green*. Special demurrer; because the defendants in their rejoinder did not tender an issue on the fact traversed by the plaintiff in his replication; and because the issue tendered in the rejoinder is too large, comprehending not only the fact of the prescription traversed by the replication, but also a matter of fact not alleged, or traversed by the replication, namely, a prescription to dig for stones &c. in *Swanwick Green*; and because the last prescription, so attempted to be put in issue, is wholly immaterial and irrelevant in this action &c; joinder in demurrer.

1791.

CHARLTON
against
KING.

Tuesday,
Feb. 1st.

If to an action of trespass in the common called *A.* the defendant plead that *A.* and *B.* commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the whole prescription.

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Chambre, in support of the demurrer, admitted that the defendant's plea was good, because it included in it a defence to the trespasss charged, but contended that as the plaintiff only complained of a trespass in *Swanwick Delves*, he was not obliged to go to trial on a right claimed in *Swanwick Green*. It would be a hardship on him to compel him to traverse the whole prescription pleaded by the defendant, because that would be permitting the defendant to give evidence of acts of ownership done in *Swanwick Green*, without first establishing a connexion between that place and the *locum in quo*.

Wood, *contra*, insisted that it was not competent to the plaintiff in his replication to narrow the prescription pleaded by the defendant. The defendants rest on a prescription, which covers not only the particular place on which the trespasss were committed, but extends also to another place, between which two places a connexion is stated in the plea, where it is alleged that the two commons lie open to each other. The objection (if any) is that the defendant has undertaken to prove more than he need have done in order to cover the trespasss: but that occasions no injury to the plaintiff, but is to his own disadvantage. For if he do not prove the whole prescription, he must fail; and unless he can prove a connexion between the two places, the acts of ownership on *Swanwick Green* will not assist him. But if he do establish that connexion, it would be extremely unjust to exclude the acts of ownership on *Swanwick Green*, which may be more numerous than those on *Swanwick Delves*; and unless he had pleaded in this manner, no evidence would have been permitted of acts done in the former. It might as well be contended that, if a plaintiff were to declare for a trespass committed on a particular part of a field, and the defendant were to justify under a right which extended over the whole, the plaintiff might in his replication narrow the right to that particular part in which the trespass was alleged to have been committed, and thereby confine the defendant to proof of acts of ownership within that part, when probably his evidence might be applicable to the other parts. Supposing the defendants' title were derived under a grant, which extended over both commons, they might undoubtedly have set forth in their plea the whole of the grant: then they may also plead their prescriptive title, since every prescription presupposes a grant.

Chambre

Chambre in reply. There is no averment in the plea to introduce the connexion between the two commons, on which the plaintiff could have taken issue. It is not necessary to contend that at all events the defendant shall be excluded from the medium of proof which he wishes to establish, but it does not follow that in all events he shall be intitled to it: whether or not he should be permitted to do so depends upon another fact, which should have been expressly averred in the plea. The argument relative to a grant instead of a prescription is by no means conclusive; it is merely proving *idem per idem*.

LORD KENYON, Ch. J. I am not able to distinguish this case from that which was put by the defendant's counsel; that if an action be brought for a trespass in a particular close, the defendant may plead that it is a part of a larger close, and that he has a right over the whole. Here it is stated in the plea that the commons lie open to each other, and that the defendant has a right in both. No injury is done to the plaintiff by this mode of pleading; for the defendant, having prescribed for the whole, must prove the whole prescription, otherwise he must fail at the trial. Whereas great injustice might be done to the defendant, if he were not permitted to plead this prescription over the whole: for if he were not, he would not be permitted to give evidence of acts of ownership over *Swanwick Green*, when perhaps his own convenience might have led him to exercise more frequent acts of ownership over that part of the common than over the other part at a greater distance from his own home. And in very extensive wastes and commons it frequently happens that particular persons for their own convenience depasture their cattle on particular spots, but that by no means excludes their right over the other parts; and in such case it would be extremely unjust that commoners, who are sued for trespasses upon one part of the waste, should not be permitted to prescribe for the whole.

ASHHURST, J. All prescriptions are in their nature entire: and when they are pleaded, the adverse party cannot deny a part only, but must either demur or traverse the whole. But though a person plead a prescription in a more extensive manner than he need do, he must prove it as laid; and in that respect he subjects himself to some disadvantage in thus pleading it: then it is but just, on the other hand, that he should be entitled to any advantage which he can derive from the prescription which he pleads. Suppose in this case that the defendant can give some

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evidence of acts of ownership in *Swanwick Delves*, but much stronger evidence in *Swanwick Green*, he ought to have an opportunity of giving the latter in evidence, having first introduced a connexion between both, which he could not be permitted to do if the prescription were confined to the former part only. If indeed the jury could separate the parts of the prescription in giving their verdict, then the plaintiff might sustain a disadvantage from the defendant's pleading this general prescription, with regard to the costs of that part introduced by the defendant in his own favor: but the jury must give a general verdict for the whole prescription one way or the other.

BULLER, J. If any case can be put where a party would have a right to take advantage of the whole of his prescription, that is sufficient to decide this case; and that has been admitted in the argument. The rest must depend on evidence. If the defendant fail in proving any part of this prescription he must fail in the whole: it is therefore incumbent on him to prove a right in *Swanwick Delves* as well as in *Swanwick Green*; which is to the plaintiff's advantage. No answer has been given to the case put of a grant, which may still be produced, if it were made before the time of legal memory: and if a grant since the time of legal memory extended the right over both commons, the party undoubtedly might plead it in the very terms of it. The instance put by my Lord is directly in point. I know no case in which it has been held that a party may narrow a prescription: where indeed an action of trespass was brought, and the defendant prescribed for sheep on a common, and proved a right for other cattle also as well as for sheep, it was held sufficient (a); now the question there must have arisen on the general rule that prescriptions are entire, and therefore that the defendant could not divide it in such a manner; but the Court, in indulgence to that case, said that the party need not plead the other part of the prescription which did not apply to the question in dispute. Now the indulgence in that case shews what the general rule of pleading is. In this case I think the defendant has alleged enough in his plea to try the connexion between the two commons: but even if he has not, that objection cannot be taken advantage of in this stage of the proceeding. That is mere matter of form; the substance is that the defendant has a right over *Swanwick Delves* and *Swanwick Common*:

(a) Vid. *Pring v. Henley*, Bull. N. P. 59.

but

but if there were any defect in form, the plaintiff should have demurred specially to the defendant's plea.

GROSE, J. The case put of a grant is decisive; for every prescription is founded on a grant; and part of a grant only cannot be traversed. Besides, this mode of pleading is for the plaintiff's advantage; for unless the defendant prove the whole prescription as it is laid, he must fail.

The Court however gave the plaintiff leave to amend.

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against
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The KING *against* S. STANNARD.

Tuesday,
Feb. 11.

MR. Attorney General moved on behalf of the defendant for a writ of *certiorari*, to remove an indictment against the defendant, an officer of excise, who was indicted with two others for a riot and assault at the *Dover Sessions*; which

The Court immediately granted, without any affidavit being provided to support the motion.

A *certiorari*
to remove an
indictment of
an excise-of-
ficer from the
sessions was
granted on
the motion of
the Attorney
General with-
out any affi-
davit.

ROLLESTON and Others, Assignees of MARGETSON,
a Bankrupt, *against* SMITH.

IN trover for the ship *Scipio*, the jury found a verdict for the plaintiffs, at the sittings after *Michaelmas Term* 1789, at *Guildhall*, subject to the opinion of the Court on a case; stating that on 24th *June* 1788 the defendant lent the bankrupt 2000*l.*, as a security for which he executed a bill of sale of the ship in question, then at sea, and wrote an order to the captain to deliver up possession of the same; and at the same time deposited in the defendant's hands the original certificate of freedom, and a policy of insurance on the said ship. On the 3d *July* 1788 *Margetson* committed an act of bankruptcy, and on the 18th of the same month the commission issued, under which the plaintiffs claim. On the 5th *September* following the *Scipio* arrived in the *Thames*, and the defendant took possession of her under the bill of sale, and continued in possession till the 4th *October*, when the ship was sold under an order of the court of Chancery, and the purchase-money directed to abide the event of the verdict in this action. The case further stated that in order to obtain a registry of a *British* ship the following steps must be taken; upon the sale of a ship the purchaser carries the

Notwith-
standing the
26 *Geo.* 3.
c. 60. s. 17.
enacts that a
bill of sale of
a ship shall be
absolutely
void, unless
the certifi-
cate of the
registry be
truly and ac-
curately in-
serted there-
in, a mere
clerical mis-
take will not
vitate it.

bill

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bill of sale from the late owner and the certificate of the registry to the bench officer, and takes the oath of ownership prescribed by the act 26 *Geo. 3. c. 60.* A note that the oath has been made with the certificate of registry is then taken to the collector outwards, who takes fresh security from the new owner agreeably to the act, and makes out a new certificate of registry and cancels the old one. An abstract of the new certificate of registry is entered in a book kept in the collector's office, another abstract in another book in his comptroller's office, a third in the register-general's office, and a fourth in the plantation or secretary's office. And the certificate of registry is signed by the register-general's and secretary's clerks, and afterwards by the collector and comptroller, and delivered to the owner. The certificate of registry is first made out, and then an abstract of it is entered in the four books above-mentioned; and no new certificate is granted till the old one is delivered up if it be in being. It also stated that when a bill of sale is to be made out of a ship which is abroad at the time, and the certificate is with the ship, which it is required to be, (and it was in this instance,) it is the practice to apply to one or other of the four offices abovementioned for a copy of the certificate of registry, which is granted accordingly. The case further set forth the bill of sale delivered to the defendant, which was in the usual form, containing a copy of the certificate of registry in these words; "In pursuance of an act passed in the "twenty-sixth year of the reign of king *George the Third*, entitled an act for the further increase and encouragement of "shipping and navigation, the said *James Margetson* having "taken and subscribed the oath required by this act, and having sworn that he is sole owner of the ship or vessel called the "*Scipio* of *London*, whereof *Dawkins Carr* is at present master, "and that the said ship or vessel was foreign built, formerly "called the *Superb*, taken prize from the *French* king's subjects "by his majesty's ship *Fortitude*, *George Keppel*, Esq. commander, "and legally condemned in the High Court of Admiralty, "as by sentence of condemnation dated 28th May 1783, and made "free as by certificate of freedom granted at *London* the 28th "January 1783, appears &c. (here followed a full and particular "description of the vessel as required, concluding thus;) Given "under our hands and seals of office at the custom-house of the "said port of *London* the thirteenth day of *December*, in the year "one thousand seven hundred and eighty-seven." It further appeared

appeared that the date of the condemnation of the ship *Scipio* is the 28th *May* 1782, and the date of the certificate of freedom is the 28th *January* 1783, in the collector's, comptroller's and secretary's books, and in the certificate of registry itself the dates are the same; but in the *register-general's book* the date of the condemnation is the 28th *May* 1783, and reference was had to that office for a copy of the certificate of the ship's register, when the bill of sale in question was executed to the defendant, which was filled up from that book. The collector's, comptroller's, register-general's, and secretary's offices, or one of them, are the proper offices for such reference. The case further set forth the certificate of registry, which tallied with the copy thereof in the bill of sale, except in the date before mentioned, and also that it had the signatures of the proper officers added thereto.

Shepherd (a), for the plaintiffs, insisted that the bill of sale, under which the defendant claimed, was void by the stat. 26 *Geo.* 3. c. 60. §. 17, which requires the certificate of the registry of the ship to be truly and accurately recited in words at length in the bill of sale: first, because there was a variance in the date of condemnation between the certificate and the recital of it in the bill of sale; and 2dly, because the names of the persons, who signed the certificate, were not copied in the bill of sale. As to the first; the date of condemnation is extremely material, because from the time of condemnation the ship became entitled to all the privileges of *British* built ships. And notwithstanding it appears from the words of reference in the copy of the certificate, "as by certificate of freedom granted at *London* the 28th of *January* 1783 appears," that the date as there set out was a mere mistake, for that the ship could not have been condemned on the 28th of *May* 1783, yet the bill of sale is equally void; for then the date of condemnation was either an impossible day, or not the true day; if the former, it must be considered as no day at all, and then the statute has not been complied with; if the latter, the certificate has not been truly and accurately set out in the bill of sale. Secondly, as the signatures of the proper officers were necessary to give validity to the certificate, they form an essential part of it, and consequently should have been copied in the bill of sale.

Wood for the defendant. In *Rolleston v. Hibbert* (b) the bill of sale contained no recital of the certificate of registry, and therefore there was no compliance with the act of parliament: but

(a) This was argued in last *Michaelmas* Term.

(b) *Ante*, 3 vol. 406.

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here the certificate is *substantially* recited, so much so that the identity of the ship might be clearly ascertained by comparing the certificate in the bill of sale with the documents in the different public offices. And this is all which the act requires. A mere literal copy is not required by the statute; and the plaintiffs might equally contend that a mis-spelling would avoid the bill of sale. It was not necessary to insert in the bill of sale the date of the condemnation at all; the officer was justified in signing the certificate when he had satisfied himself that the ship had been condemned. But even if it were necessary to insert the condemnation in the bill of sale, and the date were material, yet as the mistake in this case arose from the negligence of a public officer, to whom the Legislature gave credit, and as the purchaser did every thing in his power to comply with the act, he ought not to suffer. He could not have recourse to the original certificate, for that was then at sea; and unless the copies, which are directed by the statute to be kept at the different public offices, be considered as equivalent to the original certificate for this purpose, this statute will totally prevent the transfer of ships at sea. In answer to the other objection: the act only requires a recital of the certificate, but not of the names of the officers granting it. Those names are of public notoriety, and it must be presumed that the certificate (the legality of which has not been impeached) was signed by the officers duly authorized.

Shepherd in reply. All arguments respecting the complying with the spirit and meaning of this act are precluded by the Legislature requiring certain specific acts to be done. It is not, therefore, sufficient to set out the *substance* of the certificate of the registry; because the 17th section expressly requires that the certificate, of which the date of condemnation and the names of the officers form parts, shall be accurately recited in words at length. And the parties themselves considered it necessary to recite the whole, because they professed to set out a *copy* of it. But even if it were sufficient to set out the substance of the certificate, yet that has not been done here; for the date of the condemnation is of the substance of it. The defendant in this case cannot shelter himself under the mistake of the officer, since he does not himself appear to be free from negligence; he ought to have applied to the three other offices, where a true copy of the certificate was kept.

Cur. adv. vult.

Lord

Lord KENYON, Ch. J. now delivered the opinion of the Court.

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The single question is, whether the bill of sale were sufficiently valid to convey the property in this ship to the defendant; and it arises on the statute 26 Geo. 3. c. 60. §. 17, which enacts "that when and so often as the property in any ship, belonging to any of his majesty's subjects, shall be transferred to any other of his majesty's subjects, the certificate of the registry of such ship shall be truly and accurately recited in words at length, in the bill or other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void to all intents and purposes." Now it is clear that the parties to this contract meant to recite the certificate of the registry in the bill of sale, but it appears that in inserting it they made a mistake in one single figure; for the condemnation recited is said to bear date the 28th of May 1783, whereas really and truly the ship was condemned in May 1782, and so it appears in the certificate of the registry itself. But there is one material circumstance to be attended to, namely, the date of the certificate of freedom, which was in January 1783: now by comparing that date with the supposed date of condemnation in May 1783, it is impossible that the latter could be correct, inasmuch as the certificate of freedom would then bear date prior to the condemnation. It is apparent therefore, on the face of the instrument itself, that some error must have crept into this copy of the certificate of the registry, which was inserted in the bill of sale. Now it is impossible to conceive that the framers of this act of parliament intended to prevent the sales of ships at sea: but the statute requires that the certificate of the registry shall be always on board the ship; and that abstracts of it shall be entered at several offices belonging to the customs, one of which is the register-general's. And it is stated in the case that the parties to this bill of sale applied to that office for a copy of the certificate entered in the public books there, which they inserted in the bill of sale *verbatim et literatim* as it is there entered. They could not have recourse to the original certificate, for that was necessarily on board the ship then at sea; they went to that which was supposed to be the most authentic depositary of the certificate; and I do not see what other step they could have taken to comply with the requisites of the statute. Therefore we are of opinion that the bill of sale is valid, notwithstanding this mistake. But even supposing that the parties had had an opportunity of seeing the original certificate, it is too much to say that a mere clerical mistake

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mistake should render it null and void. Even in criminal cases such mistakes are not fatal. In an indictment for forgery (a), where the party undertook to state the tenor of a bill, and wrote "received" for "receiv'd", all the judges very properly decided that it was not a material variance. A variety of other cases of that kind might be instanced. It was the intention of the Legislature, in passing this act of parliament, that *British* ships should be entitled to certain privileges and benefits; and, by way of securing them to the owners of those ships only, it was enacted that there should be a certificate of the registry of the ship which should be inserted in the bill of sale on every transfer, to ascertain precisely that that ship was entitled to all those privileges. Now it is sufficiently ascertained in this bill of sale that this is the same ship; the only variation between the copy and the original certificate is in the figure *three* instead of *two*, which appears even on the face of the bill of sale itself to be necessarily a mistake. For these reasons therefore, and with a laudable inclination to support a fair and honest transaction, *ut res magis valeat quam pereat*, at the same time not transgressing the rules of law, we are of opinion that this bill of sale was sufficiently valid to transfer the property in this ship to the defendant; and consequently that he is entitled to the *postea*.

Postea to the defendant.

(a) *Hart's case* 1776.

Thursday,
Feb. 3d.

JACKSON and Another *against* LOMAS.

An insolvent assigned over his effects for the benefit of his creditors, and in the deed there was a proviso that the shares of those creditors, who did not execute it before a given day, should be paid to the insolvent; an agreement made between the insolvent and a creditor after that day that the latter should sign the deed, and the former pay the remainder of the whole debt, is fraudulent and void.

THIS was an action upon promises. The first count in the declaration stated that the defendant was indebted to the plaintiffs in 383*l.* 8*s.* 4*d.* on a bill of exchange accepted by the defendant for goods sold; that on the 26th *April* 1787 the defendant, being insolvent, assigned all his estate and effects to trustees for the benefit of his creditors; that on 31st *July* 1787, it was agreed between the plaintiffs, the defendant, and one *Edensor*, that the plaintiffs should execute the deed of trust, which was then in part executed by the creditors; and, in order to enable the plaintiffs to obtain payment of such part of their debt as they should not receive from dividends under the deed it was agreed as follows, that the plaintiffs should receive the dividends

that day that the latter should sign the deed, and the former pay the remainder of the whole debt, is fraudulent and void.

under the trust deed in part discharge of their debt, and, in payment of the remainder, the defendant undertook to recommend parcels of cotton to the plaintiffs for purchase, the profits to be made of which the defendant undertook should in three years make good the deficiency; but if the profits on the cottons should not be sufficient for that purpose, the defendant in his own right, and *Edensor*, as his surety, severally undertook to satisfy the plaintiffs the remainder of their debt after the three years, and, if any loss, instead of profit, should arise upon the cottons, to make good the same, over and besides what should be due to the plaintiffs for their debt. It then stated that the plaintiffs executed the deed; that they purchased large quantities of cotton, recommended by the defendant, which they sold, but that those purchases produced a loss of 107*l.* 15*s.* 10*d.*, in addition to their debt; and that they had received no dividend under the trust deed. There was a count on the bill of exchange for 383*l.* 8*s.* 4*d.*; another for goods sold and delivered, and the common money counts. The defendant pleaded the general issue.

At the trial before Lord *Kenyon* at *Guildhall* was produced the deed of trust, by which the defendant assigned over all his effects to trustees for the benefit of his creditors; and which contained a release to the defendant from the creditors, who signed, and a proviso that, in case any of the creditors should not execute the deed on or before the 26th *July* then next, the defendant should receive from the trustees the shares of those creditors, and that no creditor should be entitled to the benefit of the trust deed who did not sign before that day. It also appeared that the plaintiffs did not execute the trust deed till the 31st of *July*; when they did so, on condition that the defendant would execute the above agreement. A few of the other creditors executed the deed after the plaintiffs. It was objected by the defendant's counsel that the agreement was fraudulent, and consequently that the plaintiffs could not recover on it; and the case of *Cockshott v. Bennett* (a) was cited. Lord *Kenyon* was strongly of opinion with the defendant: but he suffered the cause to proceed, reserving this point, and giving the defendant's counsel leave to set aside the verdict and to enter a nonsuit in case the Court should be of opinion that the objection was well founded. A verdict was given for the plaintiffs; and

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(a) *Ante* 2 vol. 753.

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A rule having been obtained, the beginning of this term, to shew cause why a non-suit should not be entered; *Bearcroft, Baldwin, and Wood*, now shewed cause. This case is clearly distinguishable from that of *Cockshott v. Bennett*. There the plaintiffs held out false colours to the rest of the creditors, and induced them to believe that they were only to have a proportionable share of the defendant's effects, when in truth by a secret agreement, unknown to the other creditors, they were to receive their whole debt: but in this case the rest of the creditors were not induced to agree to the composition by the plaintiffs' signing the deed of trust; for the greatest part of them had executed it before. It was a matter of perfect indifference to them whether the plaintiffs did or did not execute the trust deed, since in neither case could they either be benefited or injured by it; as it was expressly provided in the deed that the dividends of those creditors, who would not subscribe the agreement, should go (not to those creditors who did sign, but) to the defendant himself. In *Cockshott v. Bennett* the plaintiffs meant to practice a fraud on the other creditors: but the agreement in this case was not a fraud either on the creditors or on the defendant: not on the former, because they were not induced to execute the deed by any thing which the plaintiffs either did or professed to do; and they acted on the idea that it was optional in the others, who had not signed, to execute the deed or not; nor on the latter, for at the time of entering into the agreement it was competent to the plaintiffs to have brought an action to recover their whole debt: but, instead of pursuing that compulsory mode, they agreed to receive from the defendant a part of their debt, (*not their own share under the deed*); for to that they had no title, as they did not execute the deed till after the 26th of July in money, and the remainder in a particular mode specified in the agreement, which was not prejudicial to the other creditors. The proportion in money which the plaintiffs were to receive was the property of the defendant; and this was merely an agreement by him to assign such his share to them. The execution of the trust deed by the plaintiffs was a nullity; as was also that by those other creditors who signed after the plaintiffs. Then this agreement, instead of being a fraud on the defendant, was advantageous to him; inasmuch as this voluntary mean of discharging the plaintiffs' debt was substituted in lieu of a coercive mode which the plaintiffs might have enforced.

Erskine, and *Park*, in support of the rule. This agreement was a fraud on the rest of the creditors, and an oppression on the defendant; on either of which grounds it is void. First, it was a fraud on those creditors who executed the deed after the plaintiffs; for though they did not execute within the time limited, yet they were entitled to their proportion of the defendant's effects; and the execution by the plaintiffs may have been the means of inducing those creditors to execute. And that brings this case within one of the grounds on which *Cockshott v. Bennet*, and *Jackson v. Duchaire* (a), were decided. Secondly, it is void, as being an oppression on the defendant himself. *Smith v. Bromley* (b); *Jackson v. Duchaire*; and *Cockshott v. Bennett*; in which last case Mr. J. Buller said "The defendants were absolutely in the power of the plaintiffs at the time when the note was given; they took an undue advantage of the distressed situation of the defendants. If this note had been obtained by actual compulsion, there is no doubt but that it would be void; now this is equivalent to it." But if the deed of trust, as far as respects the plaintiffs, be void, then there was no consideration for this agreement; in which case also the plaintiffs must fail. For it was part of the agreement that the plaintiffs should execute the deed. Either therefore the execution of the deed by the plaintiffs, and by those creditors, who signed it after them, was valid, and then this agreement was a fraud on them; or it was a nullity, and then there was no consideration for the agreement.

ASHHURST, J. (c). As it appears to have been part of the condition of the agreement that the plaintiffs should execute the trust deed, I think the agreement cannot be enforced: had it been otherwise, I should have been of a different opinion. But it was intended by the parties to the deed that, on the defendant's assigning over all his property to the creditors, he should become a free man; and it now appears that though the plaintiffs executed the deed, they did so on the faith of a private agreement, whereby they secured to themselves a further advantage. This then was a coercion on the defendant himself, and a fraud on those creditors who signed after the plaintiffs; and that brings this case within the principle of *Smith v. Bromley*, and *Cockshott v. Bennett*.

(a) *Ante*, 3 vol. 551.

(b) *Dougl.* 2d ed. 671. n.

(c) *Ld. Kenyon*, Ch. J. was not in Court.

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BULLER, J. The foundation of this agreement was that the plaintiffs should execute the deed of trust; and the circumstance of their not signing it until after the 26th of *July* rather adds to, than diminishes, the fraud; for that was not apparent on the deed itself, and it was done with a view of signifying to the other creditors that they had come in under the deed. But the general principle is that a secret agreement of this kind, made between the insolvent and some of the creditors, in order to induce the rest of the creditors to agree to the composition, is void. And therefore it is immaterial whether the plaintiffs executed the deed before or after the 26th of *July*.

GROSE, J. I think this case must be governed by that of *Cockshott v. Bennett*. It is pregnant with all the fraud that belonged to that case, and, for the reason given by my brother *Buller*, with somewhat more.

Rule absolute.

Thursday,
Feb. 3d.

LEFTLEY against MILLS.

The provisions of the 9 & 10 W. 3. c. 17. respecting protests of inland bills do not apply to such bills as are made payable after sight. Therefore an acceptor of such a bill who refuses payment on the 3d day of grace is not liable to any charge for the noting of the bill.

Qu. Whether the acceptor of an inland bill is bound to pay it on demand at any reasonable time of the 3d day of grace, or whether he is allowed the whole of that day to pay it in?

THIS was an action by an indorsee of an inland bill of exchange drawn for 20*l.* 7*s.* against the acceptor. The bill was dated 4th *April* 1790 payable fourteen days after sight, and being accepted on the 7th consequently became due, allowing the three days grace, on the 24th, which fell on a *Saturday*. There was a plea of *non assumpsit*, as to the whole except 20*l.* 7*s.* 6*d.*, and as to that a plea of tender. On the 24th, the plaintiff having left the bill at *Lockhart's*, his bankers, in *Pall-Mall*, one of *Lockhart's* clerks called at the defendant's house with the bill, but the defendant not being at home the clerk left word where the bill lay, that the defendant might send and take it up; which not being done before six o'clock, it was noted by another clerk of *Lockhart's*, who was a notary. Between seven and eight o'clock in the evening the same person who first went to the defendant's called on him again with the bill, in the character of the notary's clerk, when the defendant offered to pay the amount of the bill, but refused to pay half-a-crown more which was demanded for the notary. Evidence was given that it was usual to pay 1*s.* and 6*d.* for noting and demanding in the city, and 2*s.* and 6*d.* on the West-side of

Temple-

Temple-bar, where this transaction happened. And that by the custom the acceptor of a bill has during the banking hours to discharge it in; but if it be not paid by that time it may be noted: but as to what those banking hours were, no certainty appeared; they were different at different parts of the town. At all events however it was admitted that the second time the clerk called with the bill was after the banking hours. Lord *Kenyon* was of opinion at the trial at the Sittings after last term that the tender of the amount of the bill at any time on the same day on which it was payable was sufficient; under which direction the jury found a verdict for the defendant. A rule *nisi* was obtained for setting aside the verdict and granting a new trial, on the ground that half-a-crown more, the charge of noting, ought to have been tendered.

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The Court on granting the rule said they could not take notice of what were called banking hours, but considered the main question to be, whether the acceptor had the whole day to pay the bill in; or whether it became due on demand at any time on the last day.

Erskine shewed cause. This, being the case of an inland bill of exchange, must be regulated by the stat. 9 & 10 W. 3. c. 17. which gives the protest; on which statute several objections arise to this action. 1. An inland bill can only be protested *after* the three days grace are expired. 2. Only 6*d.* can be taken for protesting, and here 6*d.* has been tendered. 3. A bill payable at so many days after *sight* cannot be protested at all: the words of the statute, which gives the power of protesting, being confined to bills payable at so many days certain from the *date*. 4. But at all events as to the tender; it is a known rule of law that if there be no certain time fixed for the payment of a sum of money, the party has the whole day to pay it in on which it becomes due. 1 Lord *Raym.* 280.

Mingay and *Shepherd* in support of the rule. The statute of *Wil.* does not govern this case: it merely gives a new remedy as against the *drawer*, but leaves the law with respect to the *acceptor* as it stood before. Neither was it intended to alter the law even as to the drawer, but it is merely accumulative; for it directs that notice of the protest shall be sent to the drawer within fourteen days; and yet it cannot be disputed but that if no notice of non-payment by the acceptor were given to the drawer till that time he would be discharged by the laches of the holder: which shews that, notwithstanding the accumula-

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tive remedy given by the statute, inland bills are still governed by the ordinary rules affecting foreign bills by the custom of merchants. If it were otherwise, the *acceptor* would not be entitled to his three days of grace under the statute. Then the question is whether by the custom of merchants the acceptor be not bound to pay the bill at any time when it is tendered to him on the last of the three days of grace: for if such be the custom, it then becomes a contract by him to pay the bill accordingly. Now it appears clearly here to be part of the custom of merchants to note a bill unless it be paid on demand; and that 2s. and 6d. is the sum usually taken on such noting. If so, the acceptor was bound to reimburse the holder that expence which accrued on the default of the former. By the custom of merchants on foreign bills, to which this has reference, the protest for non-payment must be made on the last of the three days of grace (a). Again, it is evident that the debt becomes due and may be demanded on that day; for if the acceptor deny himself on the third day to a bill holder, that is an act of bankruptcy; which can only be by denial of one who is then an actual *creditor*. *Colkett v. Freeman* [ante, 2 vol. 59.] If in that case the bankrupt instead of denying himself had refused payment, the holder might have sued out a writ against him. So here, if, instead of noting the bill, the plaintiff had sued out a writ, he would have been justified in refusing the subsequent tender without the expences of the writ. The noting therefore is an indulgence to the acceptor: it is one of the previous steps towards compelling payment of the bill, which it was competent for the holder to take as soon as the bill had been tendered for payment and not discharged. With respect to the objection that this noting was a day too soon, by the stat. of *Wil.* it is laid down in *Tassell v. Lewis*, 1 *Ld. Ray.* 743. that if the last of the three days on which the bill is to be paid be on a *Sunday*, there the party ought to demand payment and protest the bill on the second day. So here *Saturday* being the last of the three days, the plaintiff was not bound to wait over till the *Monday* but might demand payment the third day.

Lord KENYON, Ch. J. The question here is on what day and at what time the defendant was bound to pay this bill. According to the nature of the contract, the acceptance was an undertaking to pay the bill on the last of the three days of grace. Now unless there be something in this case to distinguish it from other contracts, it must be governed by the same rules. In the

(a) 1 *Lord Raym.* 743.

case of mortgages, bonds, and a variety of other instruments, whereby parties oblige themselves to the performance of certain duties, as to pay money within a certain time, we find the rule to be, without any exception, that the party bound has till the last moment of the day to deliver himself from the obligation by paying. The first case in point of time is that of *Hudson v. Barton*, 1 *Rol. Rep.* 189; where Lord *Coke* said that a debtor is not bound to pay till the last hour of the day; and though *Haught, J.*, seemed to differ from Lord *Coke*, that difference was applicable to another part of the case. Lord *Hale* also in *Kabel v. Vaughan*, 1 *Saund.* 287, was of this opinion, and said that rent was not due till the last instant of the day. *Moor* 122. *pl.* 166.; and *Salk.* 578, are to the same effect. And I find no authority to the contrary; therefore the law must be the same here as in other cases. It may be said that there is a difference in the law as applicable to contracts and forfeitures; but it is better that there should be one general and invariable rule for all cases, and adapted to the understanding of all men. Now if a party is to perform a certain thing on a given day, in order to prevent his incurring the guilt of a crime, as for instance, a bankrupt to surrender, it is clear that if he surrender on the last instant of the day, it is sufficient. And it is the common practice for the commissioners to attend till 12 o'clock at night on such occasions, if the bankrupt do not surrender before. And in the case of bills of exchange, it cannot be said that due diligence is not used if demand be made on the day after they become due. Therefore it seems to me that in this case the plaintiff was endeavouring to impose terms which are not warranted. But even if there be any difference between bills of exchange and other contracts in this respect, and that, for reasons which have not been stated, the party has not the whole day to pay the former, the objections made by the defendant's counsel are decisive. There could be no protest of an inland bill of exchange before the statute of *William*; and that statute only gives a protest upon bills payable at a certain number of days *after date*, whereas this is a bill payable 14 days *after sight*, upon which the statute does not attach. And even in cases to which that statute does apply, it says expressly that the holder may protest the bill *after the expiration of three days* after the bill becomes due; then it is that the power to protest arises, but here the plaintiff noted the bill (which is a preliminary step to the protest) before that time. The acceptor in this case undoubtedly

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was obliged to go to the holder of the bill when it became due; and if he did not at that time tender the amount of the bill, the holder might have commenced an action against him without demanding payment: but in this case the acceptor tendered the money within the time allowed him by the law. And if we were driven to the necessity of considering the amount of the tender under the statute, in point of fact there was a tender of 6*d.* which is the exact sum given by the statute in the case of protesting inland bills of exchange. Therefore, in every view of this case, I am of opinion that the defendant did every thing that the law required of him, and that the plaintiff is not entitled to recover.

ASHHURST, J. This is so clear on the act of parliament that it is not necessary to add any thing to what my Lord has said.

BULLER, J. As to the event of this rule, I most thoroughly concur in opinion with the Court. But I cannot refrain from expressing my dissent to what has fallen from my Lord, respecting the time when the payment of bills of exchange may be enforced. The rule as to the time of paying rent, or any of the other cases mentioned by my Lord, cannot, I think, apply to this case. But one of the plaintiff's counsel has correctly stated the nature of the acceptor's undertaking, which is, to pay the bill *on demand on any part of the third day of grace*; and that rule is now so well established, that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange; all the books agree that the protest must be made on the last day of grace: now that supposes a default in payment, for a protest cannot exist unless default be made. But if the party has till the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore the usage on bills of exchange is established; they are payable any time on the last day of grace on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour: but, on the other hand, to say that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences. If this case were to be governed by any analogy to the demand of rent, payment of a bill of exchange could not be demanded till sun-set; and if so the situation of bankers would be extremely hazardous; for they would then be obliged to send out their clerks at night with bills to a very considerable amount, all of which must be presented within
a short

a short space of time, though to houses in different parts of the town. However this consideration need not be further pursued for the determination of this case. For this rule must be discharged, in whatever view it is considered. Even if this had been a foreign bill of exchange, there would have been no pretence for the demand which the plaintiff made. It was properly said by one of the witnesses, that the fees of the notary are for *noting and demanding*. In making a protest there are three things to be done; the noting, demanding, and drawing up the protest. The noting is unknown in the law, as distinguished from the protest; it is merely a preliminary step to the protest, and has grown into practice within these few years. But in this case the notary's clerk made a note on the bill merely for his own convenience; only to save himself trouble, in the same manner as bankers' clerks frequently write on the bill "received the contents" even before they go out of their master's office; and which words are afterwards struck out, if the bill be not paid. The next and the material part, is the making of the demand: the party, making the demand, must have authority to receive the money; and in case that is refused the drawing up of the protest is mere matter of form; but if the person, on whom the demand is made, be ready to pay the amount of the bill, he does all that the law requires of him. Therefore, if this had been the case of a foreign bill of exchange, the defendant would not have been liable to pay the fees of protesting, because he was ready to pay when the demand was made. It is material too to consider by whom the demand was made in this case; I am not satisfied that it was a proper demand, for it was only made by the banker's clerk. The demand of a foreign bill must be made by a notary public; to whom credit is given, because he is a public officer. However in this case there could be no protest at all: It is clear that, at common law, no protest was required on an inland bill of exchange; it is only made under the statute of *William*, which does not apply to this case, for the reasons already given.

GROSE, J. agreed with the Court on the construction of the statute; but declined giving any opinion on the other point, as unnecessary to the decision of this case.

Rule discharged (a).

(a) As to some of the points discussed, see the statute 3 & 4 An. c. 9. s. 4, 5, 6, 7, & 8, (made perpetual by 7 An. c. 25. s. 3.) which seems not to have been adverted to either in the argument or the judgment.

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Friday,
Jan. 28th.SWAYNE Assignee of a Bankrupt, and Two Others,
against C RAMMOND.

If an assignee of a bankrupt, and two others, sue jointly, the former may hold the defendant to bail, on an affidavit of the debt "as appears by the bankrupt's books, and as the deponent believes."

A Rule having been obtained to shew cause why the bail bond should not be given up to be cancelled on the defendant's filing common bail, on the insufficiency of the affidavit on which he had been holden to bail, and why all proceedings should not be stayed in the mean time,

Marryat now shewed cause; and insisted that, as the affidavit was made by one of the plaintiffs as assignee, it was sufficient as it stated "that the defendant was indebted to the plaintiffs for goods sold, as appears by the bankrupt's books, and as the deponent believed (a)."

Baldwin, in support of the rule, admitted that the affidavit would have been sufficient if the assignee had been the only plaintiff: but he said that, as the action was brought by him and two others, one of the latter might have made a positive affidavit of the debt. But

The Court were clearly of opinion that this affidavit was sufficient; and they observed that the consequence of not allowing it to be good would be to prevent the assignee arresting the defendant at all, unless the others would assist him.

Rule discharged.

(a) *Sheldon v. Baker*, ante, 1 vol. 83.

Friday,
Feb. 4th.
When a rule to set aside proceedings for irregularity, and to stay proceedings in the mean time, is obtained, the proceedings are suspended for all purposes till the rule is discharged.

On a subsequent day another question arose on the effect of the latter branch of the above rule, relative to the staying of the proceedings; for, on a supposition that as the rule was discharged the proceedings were not suspended for any other purpose than that of disposing of the rule, the plaintiff took an assignment of the bail bond at the expiration of the time that the defendant originally had to put in bail; which

Marryat contended was regular.

Baldwin, contra, said that it was perfectly immaterial whether the former rule were or were not discharged as far as respected this question, for that in either case the defendant had the same time to put in bail after the rule was discharged as he had before: the rule suspends the proceedings to all purposes.

The Court (after consulting the master) agreed that the proceedings were totally suspended by an act of the Court; and they

they made this rule absolute to set aside the assignment of the bail bond, as having been made too soon.

1791.

FENN and Another *against* HARRISON and Others.Friday,
Feb. 4th.

ON the third trial of this cause (a) at the sittings after last term before Lord *Kenyon*, the same evidence was given as on the second trial, with this difference, that, when the defendants desired *F. Huet* to get the bill discounted, *they did not say that they would not indorse it.* The jury found a verdict for the plaintiffs, which the defendants' counsel moved in this term to set aside: but, after arguments at the bar by *Bearcroft*, *Erskine*, and *Baldwin*, in support of the verdict, and *Mingay*, and *Law*, on the other side,

If an agent, employed by the indorsee of a bill to get it discounted, warrant it to be a good one, his employers are bound by his act, and are liable to refund if the bill be afterwards dishonoured by the acceptor.

The Court were unanimously of opinion that the rule for setting aside the verdict, and for granting a new trial, should be discharged; on the ground that, as the defendants had authorized *F. Huet* to get the bill discounted, without restraining his authority as to the mode of doing it, they were bound by his acts; and that, if it were doubtful, from the conversation which passed between the defendants and *F. Huet* at the time when they applied to him to get the bill discounted, what authority the defendants intended to confer on *F. Huet* in this transaction, their subsequent conduct, in promising to pay the bill, was decisive. But

ASHHURST, BULLER, and GROSE, Justices, said that, unless the evidence on this trial had varied from that given before, they should have continued to entertain the same opinion which they delivered on the former occasion.

Rule to grant a new trial discharged.

(a) *Vid. ante*, 3 vol. 757.

The KING *against* The Inhabitants of EATINGTON.Saturday,
Feb. 5th.

JACOB Harris, the pauper, was removed by an order of two justices from *Eatington* to *Hooke Norton*; the sessions on

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fee, in consideration of 36*l.*, with a proviso "that *A.* shall live in and occupy the said cottage with the appurtenances as he theretofore had done and then did for life;" *B.* only takes a remainder after an estate for life in *A.*, and therefore has not such an interest during *A.*'s life as will enable him to gain a settlement by a residence on the estate.

appeal

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appeal quashed the order, and stated the following case. The pauper, being legally settled at *Hooke Norton*, married the daughter of one *G. Malings*, who was seised in fee of a cottage in *Eatington*, in which he resided. Immediately upon his marriage in 1780, the pauper and his wife went to reside with *Malings* in the cottage; where they resided for three months, when they were removed by an order to *Hooke Norton*. During the time of the pauper's residence at *Hooke Norton*, which was about a year and an half, an only son of *G. Malings* died, upon which *G. Malings*, who was old and infirm, applied to the pauper and his wife to come and live with him at *Eatington*, and take care of him; and, in order to induce him so to do, agreed to convey the cottage to the pauper. Accordingly by indentures of lease and release, dated the 28th and 29th of November 1783, *G. Malings*, in consideration of 36*l.* therein mentioned to be paid by the pauper to *Malings*, granted, and conveyed, the cottage to the pauper in fee. In the release was the following proviso; viz, "Provided always and it is hereby declared and agreed by and between the said parties to these presents, and it is their true intent, and meaning, that it shall and may be lawful to and for the said *G. Malings* to live, inhabit, dwell in, and occupy, the the said cottage or tenement with the appurtenances as he heretofore has done, and now does, for and during the term of his natural life; any thing hereinbefore contained to the contrary thereof in any wise notwithstanding." No money was paid by the pauper to *G. Malings* at the time of the execution of the deed, as a consideration for the purchase; but the premises were then of the full value of 30*l.* Immediately after the deed was executed the pauper and his wife went to reside at *Eatington* with *G. Malings* at this house, so conveyed, and resided there with him till they were removed by the present order. In 1785 a mortgage of the cottage was executed by the pauper for 12*l.*; the whole of which he received. In May 1790 a conveyance of the cottage was executed by the pauper and *G. Malings* to *W. Harris* in fee; 31*l.* part of the consideration money were received by the pauper, and the remaining 3*l.* were paid to *G. Malings*. The court of quarter sessions were of opinion that there was no fraud in any part of the transaction.

A rule having been obtained on a former day to shew cause why the order of sessions should not be quashed;

Caldecott, *Romilly*, and *Willis*, were now called upon to support their rule. First, No title to the possession of the cottage passed to

the pauper by the conveyance from his father-in-law, but merely *the reversion*, expectant on the death of the father, because the latter reserved to himself the *occupation of the whole, during his life, in as ample a manner as he enjoyed it before*. If the father were entitled to occupy &c, as before, the son-in-law could only be an inmate or a lodger; he could have no right but by the father's permission, otherwise the father would not occupy as he had done before, for before he had the sole and exclusive possession. The word "occupy" was used in the proviso in a larger sense than the preceding words "live, inhabit, and dwell;" for not only the cottage but the appurtenances also were reserved, which mean the whole profits. The word "occupy" will of itself carry the whole profits. *Manning's case*; 8 Rep. 95. b. If it be said that the father-in-law could not alien the estate, and that he must enjoy it himself, still it is an estate for life. In *Co. Lit.* 42. a. it is said that "if a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or as long as the grantee dwell in such a house &c; in all these cases the grantee hath in judgment of law an estate for life, determinable &c." If there were any doubt on the terms of the deed, the subsequent conduct of the parties shews what their intention was in making this conveyance; for the father-in-law and the pauper both joined in a sale of the cottage in 1790, under the idea that they had both a legal interest, the former a life-estate, the latter the reversion. Then if the father had the right of occupation of the whole for his life, the son had no right of present possession, and consequently could not gain a settlement. The father indeed might have gained a settlement by residing in the cottage; *R. v. Wodbourn*; *Burr. S. C.* 785; and *R. v. Natland*; *ib.* 793; but it cannot be contended that the son could also. But, Secondly, this was not a purchase for 30*l.* *bonâ fide* paid under the stat. 9 Geo. 1. c. 7. §. 5. (a); for no money at all was paid; neither was the pauper's interest in the estate worth 30*l.* after deducting the father's life-estate (b). But though no money was in fact paid, it was intended to be a money consideration only, and not of blood or natural affection. This is not like the case of *R. v. Aston Underbill* (c): There the considerations were marriage and natural love and affection, and the estate was conveyed by the father to his daughter and her husband, and to

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(a) But that statute only says, that such a purchaser shall not have a settlement for a longer time that he shall inhabit in such estate. See the state of the case.

(b) This did not appear in the case; but it was admitted by the counsel on the other side.

(c) *E. 24 Geo. 3.*

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their heirs for ever; whereas this is a conveyance in consideration of money only, and the estate was conveyed to a stranger, the husband of the daughter, and not to him and his wife jointly.

Bearcroft, and *Morrice*, in support of the order of sessions, in answer to the first point, contended that the pauper took a *present* interest by the lease and release. The former part of the deed passed a fee to him; and the subsequent proviso only reserved to the father-in-law a liberty to reside in the cottage during his life; but there was no reservation of any estate to him. It is not pretended that the words "live, inhabit, and dwell in", reserved any estate; neither is there any such technical sense annexed to the word "occupy" as is supposed. All the words are here used as synonymous; and it might as well be said that the words "inhabit and dwell in" have a more extensive signification than the first word "live," as that the last word "occupy" has a greater meaning than the words preceding it. It is not necessary to contend that the pauper had a present right of possession *to the whole*; it is sufficient if he had a right to reside *in any part*. The very inducement to the father-in-law to enter into the contract was, that the pauper should immediately reside in the cottage; the right of present possession was granted to him for the purpose of securing his residence there; and the object of all parties would be defeated by his being removeable from thence. But if the proviso be to operate as a grant, or rather as a reservation, *of the whole* to the father, then it is repugnant to the prior grant, and therefore void. For when two clauses in a deed are so totally repugnant to each other that they cannot both take effect, the latter must be rejected. 2 *Ro. Abr.* 455. As to the other question, this is not a purchase within the statute 9 *Geo.* 1.; because "purchase" in that statute is confined to cases where a pecuniary consideration is paid. *R. v. Marwood.* *Burr. S. C.* 386. Now this was either a gift, or a marriage settlement. It being stated that no money was paid, (if the Court can consider such evidence admissible) it may be construed to be the former, as it was a conveyance by a father-in-law to his son-in-law; and there is no pretence to impute fraud to the transaction, for it is expressly negatived by the case. Or it may be said to be a marriage settlement; and that there was the consideration of love and natural affection, which takes this case out of the statute. But if the Court cannot take notice of any other consideration than that which is expressed in the deed, then it must be considered to be a purchase

chafe for more than 30*l.* paid, for no evidence ought to have been admitted to prove the contrary. *Fisher v. Smith, Moor*, 570.

LORD KENYON, Ch. J. The material question here is whether by the conveyance by lease and release an immediate estate in possession was vested in the releasee; for it is admitted that, unless it conveyed an estate of present interest, the pauper did not gain a settlement by residing in *Eatington*. It has been contended that, the former part of the release having conveyed a fee to the pauper, the subsequent proviso is so totally repugnant to it that it must be rejected. But an estate for life to one is not totally repugnant to, but consistent with, an estate in remainder to another. And it cannot be contended that the proviso must be rejected because it stands last in the deed, and restrains the estate before created; for in all deeds of settlement, where uses are first limited, various powers, exceptions, and different modifications of them, which are to arise as shifting uses, are afterwards introduced. Then if it be immaterial in what part of the deed the proviso is inserted, (and indeed it is so,) the fair construction of the whole deed, taken together, is that an estate for life was reserved to the father, and an estate in remainder granted to the pauper. If this question had depended on the first words in the proviso, I should have thought that they would have been satisfied by determining that only a liberty to inhabit the cottage was reserved to the father: but the word "occupy" carries the interest reserved still farther, and shews that the whole estate was intended to be reserved to him. And if we were to go into the subsequent transaction, it is manifest that this was the intention of the parties; for the father joined with the son-in-law in making the conveyance in 1790, which shews that the parties themselves conceived that they had a power to convey. If such be the construction of the conveyance, the estate in remainder was not come into possession when the order of removal was made, and consequently the pauper had not that which was necessary to confer on him a settlement, namely, a present interest. Therefore it is unnecessary to go into the other point.

ASHHURST, J. In whatever light this case is considered, the pauper had not such an interest as entitled him to gain a settlement in *Eatington*. If this be considered as a purchase for a pecuniary consideration, it was not of the value of 30*l.* after deducting the father's life estate. But then it was contended,

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that this conveyance was made as well in consideration of blood and natural love and affection as of money; and therefore that it does not come within the stat. 9 Geo. 1.; even taking that to be so, it shews what was the intention of the parties, and falls in with the construction put on the deed by my Lord, that the father only conveyed the remainder to his son-in-law expectant on the determination of his own life estate. The word "occupy" in the proviso is extremely material to shew that the deed must have this operation; for it is a reservation of the thing itself, of the whole estate. For a license to occupy an estate for a particular time is a lease of the whole estate for that time. Therefore the son-in-law had no right to the possession of the cottage during his father's life, and consequently did not gain a settlement by living there.

BULLER, J. The material question is whether, by the terms of the proviso, the father is to be considered as having reserved merely the liberty to live in the cottage, or an estate for life; and there is no doubt but that the latter was intended. Something more was meant than a bare license to inhabit or live in the house, for the word "occupy" is added to them; and it does not even rest there, for these are followed by other words "as he heretofore has done, and now does, for life". Then how did he occupy it before? He had *the whole* before. If it had been intended that the father-in-law should reserve merely a right to live in the cottage, and that the son-in-law should also have the same right during the father's life, the former would have reserved a right to inhabit *particular rooms* in the house; but he reserved *the whole* for his life. The intention therefore clearly was that the father-in-law should enjoy the estate for his life, and that the pauper should only take the remainder expectant thereon.

GROSE, J, not being in Court when the case was argued, gave no opinion.

Order of sessions quashed.

Monday,
Feb. 7th.

HUNTER and Others, Assignees of BLANCHARD and
LEWIS, Bankrupts, *against* POTTS.

If, after the
assignment of
a bankrupt's
estate, a cre-
ditor knowing it, and residing in *England*, attach the money of the bankrupt abroad, the assignees may re-
cover it in an action for money received to their use.

THIS was an action for money had and received, to which the defendant pleaded the general issue. On the trial

before

before Lord *Kenyon* at *Guildhall* a special verdict was found; which, after setting forth the formal parts, (namely, the trading, the petitioning creditor's debt, the bankruptcy, the commission, and assignment,) stated that the bankrupts before their bankruptcy, were indebted to the defendant on a contract made in *England*; at which time, and also at the time of the bankruptcy and until the assigning of the attachment hereafter mentioned, all the parties were resident in *England*; that after the issuing of the commission of bankrupt, and the making of the assignment, the defendant, *knowing thereof*, gave orders to his attorney in *Rhode Island, North America*, to attach the effects of the bankrupts in that island; in consequence of which the attorney in *May 1785* attached, in the regular way, certain monies in the hands of *J. and W. Russell*, which were due from them to the bankrupts at the time of the bankruptcy, and in *November 1786* obtained in the court of Common Pleas in *Rhode Island* a regular judgment against the bankrupts for *496*l.* 12*s.* 9*d.** and costs; which sum he afterwards received, and remitted to the defendant in *England*, who claims to hold the same to his own use. The verdict also stated that the proceedings of the court in *Rhode Island* were continued by imparlances from *May 1785* to *November 1786* at the request of the *Russells*, in order that the bankrupts might have notice of such proceedings.

This verdict was twice argued; the first time in last *Trinity* term by *Wood* for the plaintiffs, and *Marryat* for the defendant; and in *Michaelmas* Term by *Law* for the plaintiffs, and *Bower* for the defendant. But as the whole case was so fully gone into in the second argument, the former one is here omitted.

Law for the plaintiffs contended, generally, that the bankrupt laws of this kingdom, in every question between resident subjects, bind the personal property of the bankrupt wherever it may be found; which involves these three propositions; 1st. That the bankrupt laws do, with respect to the personal property of resident subjects, effect an entire substitution of the assignees in the place of the bankrupt as to all his rights and powers over the same, as well *without*, as *within*, the kingdom; 2dly. That this substitution or representative character is recognized by the general law of nations, which universally adopts the *lex domicilii* as the rule in respect of *personal* property; 3dly. But more especially as between subjects of this kingdom resident within it, and knowing of the substitution. The first proposition is proved by the words of the statutes 13 *Eliz. c. 7.*

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f. 2. and 1 f. 1. c. 15. f. 13; the latter of which enacts that all debts due to the bankrupt shall, by the assignment of the commissioners, vest in the assignees as fully to all intents and purposes as if the contracts upon which such debts arose had been originally made with the assignees themselves: they are declared not to be attachable as the debts of the bankrupt according to the custom of *London*, or *otherwise* [which must mean according to any other custom of attachment.] And the bankrupt is precluded from recovering, releasing, or discharging, the same. The assignment is, therefore, an executed transfer of all the bankrupt's rights to his assignees, and the representative character is as fully vested in them as the laws of this country can provide for. 2d & 3d; The next question then [which involves the 2d & 3d propositions] will be upon the extent of our laws on such a subject, and their general competency to bind the subjects of this realm, though the property of the bankrupt be not within the local limits of their jurisdiction, but within the limits of a foreign jurisdiction. And that will depend in part on the law of nations. According to *Vatell* (a), and all the writers on this subject (b), immoveable property follows the disposition made by the laws of that state wherein it is situated, but the succession and disposition of moveable property is regulated not by the law of the country in which it is locally situated, but by that of the owner's *patria* or *domicile* whence he came and whither he intends to return. And they also shew that all civil relations between parties in their own country are recognized in Foreign states. Upon this principle a probate would be granted here upon the foot of a foreign probate, in the case of a foreigner who died leaving property in this country. If it be contended that the bankrupt laws are penal in their nature, and that the *penal* laws of one country are not recognized in another (c), it may be answered that the operation of the bankrupt laws is two-fold; and this action is brought to enforce the civil, not the criminal, provisions of those statutes; the former of which only attach upon the property of the bankrupt, to whom as well as to the creditors their operation is beneficial. And the law of nations, recog-

(a) *B. 2. c. 7. f. 85. c. 8. f. 109, 110.*

(b) *Voet. Com. Lib. 38. tit. 17. f. 34.*
Hub. Prælec. part 1. lib. 3. tit. 13. f. 21.
Lord Kaime's Pr. 59. b. 3. c. 8. f. 4.
Ersk. b. 3. tit. 9. f. 4. Denifart Collec. de
Juris. voce domicile. f. 3. & 4. Hub.
Prælec. cap. de conflictu legum. tom 2. lib. 1.
tit. 3. per totum. Cap. de arresto reali, tom. 2.

lib. 2. tit. 4. f. 1. 5. tom. 3. lib. 20. tit. 4.
de concursu hypoth. simpl. tom 3. lib. 42. tit. 3.
de cessione bonorum, tit. 4. quibus ex causis in
poss. ratur. tit. 5. de reb. auct. jud. poss.
tit. 7. de curat. bon. dand.

(c) *Vid. Ogden v. Folliott, in Error,*
Ante 3 vol. 734. 4 Mod. 222.

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nizing the *lex domicilii* as the governing rule with respect to moveables, with the exception above mentioned, has been adopted by the courts of judicature in this country. An administrator, though an alien enemy, as suing in *auter droit*, may maintain an action here. *Brocks v. Phillips*, *Cro. Eliz.* 684. *Skin.* 370. In *Thorn v. Watkins* (a) Lord Hardwicke laid down the rule generally, that debts due in *Scotland* to an *English* subject resident here, who died intestate, were distributable when recovered according to the laws of *England*. And he said the question would be the same with respect to the goods of an intestate in *France*, or any Foreign country. And if a foreigner died leaving property in this country, it would be distributable according to the laws of his own country: he also said that debts followed the person, not of the debtor, but of the creditor to whom due; and observed that the same had been before ruled by him in *Pipon v. Pipon* (b), with respect to the island of *Jersey*; and by the House of Lords in a case arising on the lunacy of Mr. *Morris* from *Scotland*. Again in *Burn v. Cole*, before the Privy Council 1st *April* 1762, it was determined that where a testator domiciled in *England* died, the judge of the probate in the plantations was bound by the probate granted here. And lately in a case of *Kilpatrick v. Kilpatrick*, *July* 1787, Lord *Kenyon*, when master of the Rolls, upon the same principle applied the law of *Scotland* to money in court, upon the Master's Report, stating what that law was. All these cases, and others of a like nature collected in *Bruce and others v. Bruce*, *Dom. Proc.* *April* 1790, shew clearly that with respect to personal property the *lex domicilii* and not the *lex rei sitæ* is permitted to prevail. *Prec. in Chan.* 207. and 1 *Bro. P. C.* 38. S. P. An opinion of Lord *Talbot's*, when at the bar, is stated in *Beawes* (c) on this very point, that the effects of a bankrupt in the plantations were liable to a commission here, and the right vested in his assignees. And this principle was recognized in the fullest extent by Lord *Mansfield* in *Ballantine v. Golding*, *M.* 24 *Geo.* 3. *B. R.* (d); where upon a motion to enter an *exoneretur* on the bail-piece, on the ground that the defendant had been a bankrupt, and had obtained a certificate under the great seal of *Ireland*, his lordship said that it was a general principle that a discharge by the law of one country would be a discharge in another; and that he remembered a case in Chancery of a

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POTTS.(a) 2 *Vez.* 35.(b) This is since reported, in *Ambl.* 25.(c) *Lex Merc.* 543. 4th edit. and *Cook's**Bank. Laws* 347. 1st Ed.(d) *Cook's Bank. Laws* 347. 1st Ed.

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cessio bonorum in *Holland*, which is a discharge in that country, having had the same effect here. Therefore if Lord *Mansfield* had ever held the contrary opinion, which is imputed to him in the case of *Waring* and others v. *Knight* (a), it is plain that he had altered it. But even in that case he is reported to have said that the assignees might recover a debt due to the bankrupt in foreign countries, and that the bankrupt laws would be there recognized; which he says had been so held lately in a case at the *Cockpit*. That seems to be the case of *Cleve* v. *Mills*, 27th July 1764 (b), wherein his Lordship indeed said that the statutes of bankrupts did not extend out of *England*, but that the assignments under commissions were considered as *voluntary*, and as such took place between the assignees and the bankrupt, but did not affect the rights of any other creditors; which he said had been settled in *Wilson's* case, where Lord *Hardwicke* would not interfere to stop the proceedings of particular creditors of a bankrupt here against his estate in *Scotland*, but said that they should have no benefit from the commission here till they made the other creditors even with them. Now these opinions are certainly not reconcileable; for if the assignees were entitled to recover the property of the bankrupt abroad, it follows that the bankrupt laws must in some degree extend thither; for they could have no title to recover the bankrupt's property there but what was derived from those laws. Besides, the commissioners' assignment cannot be said to be *voluntary* in any sense of the word; for in one sense it is by the compulsive force of the Legislature, and in the other it is clearly for a valuable consideration. Both Lord *Talbot* and Lord *Mansfield* recognized the right of suit by the assignees in foreign countries; to admit which is to admit the substitution as made by the *lex loci*, which always takes place as to moveable effects, except as far as it is contravened by the municipal laws of those countries where the character is to be exercised. But in this instance those laws which subject the property of *A.* to be attached in the hands of *B.* for the debt of *A.* warrant no attachment of the property of *C.* (for such by the assignment *A's* property is become) for the debt of *A.* What the case of captain *Wilson* was, which Lord *Hardwicke* is said to have decided, does not appear in any of our Reports; though possibly it arose out of the same transaction as is reported in the printed decisions of

(a) Sittings after Hil. 5 Geo. 3. Co. B. L. 1 Ed. 243.
B. Laws. 2 Ed. c. 13.

the court of sessions in *Scotland*, from 1752 to 1756 (a), by the name of *Bradshaw* and others, who were the assignees of Captain *Wilson v. Fairholme* and others, the attachment creditors: where it appears that captain *Wilson* was domiciled in *England*, and that the attachment of his debts in *Scotland* by *English* creditors was not sustained against the assignees. But it does not appear that the decision of the court of session was appealed from in that instance. And what Lord *Mansfield* is reported to have said of Lord *Hardwicke's* refusing to admit a creditor, who had attached property in *Scotland*, to prove his debt under the commission here, till the other creditors were put upon an even footing with him, might have been the case of another creditor of *Wilson's*, who had a priority upon *immoveable* property in *Scotland*; and then indeed the decision would be right. Neither does the case of *Le Chevalier v. Lynch* (b) contradict the principle contended for. That was an action brought by the assignee of *Dormer* a bankrupt against a foreign garnishee, who had paid money due from him to the bankrupt to a creditor of the bankrupt's under an attachment abroad. Nothing could be more clear than that such a person who had been compelled by a competent jurisdiction to pay the debt once should not be compelled to pay it over again. *Cleve v. Mills* (c), and *Allen v. Dundas* (d), went upon the same principle. Those cases differ materially from this; for here the action is brought against the party receiving the money, and that too with full notice of the assignment under the commission. The case of *Richards* and others assignees of *Buchanan* and *Hamilton v. Hudson* and others (e) was an appeal from a decree of the court of chancery in *Virginia*, brought by the assignees against the executors and representatives of certain legatees, entitled to sums of money left in the hands of the bankrupts several years prior to and at the time of the bankruptcy. These executors and legatees, for whom *Buchanan* had been a trustee, had instituted a suit for the purpose of stopping the bankrupt's effects in the hands of *Jerdone* and *Duncanson* agents of the assignees, and having satisfaction for their legacies therefrom; the agents and the assignees insisted on the right of the latter, and that the court ought not to hold jurisdiction: That court however decreed against them, and directed the agents to

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pay over the effects that they had in their hands at the time they were served with the process. But this decree against the rights of the assignees claiming the bankrupt's effects in *Virginia* was reversed by the privy council; and therefore by that decision the operation of the bankrupt laws on property situated in another country was fully established, at least as against those who were subject to the dominion of our own laws. As to the case of *Beckford* and others assignees of *Balmer* a bankrupt v. Sir *B. Turner* and another assignees of *John* and *James Woodbridge* bankrupts (a), that went on another ground. The first question there was, whether the attachment law of *Jamaica* extended to debts contracted in *Great Britain*, between merchants residing there; and 2dly, Whether the plaintiffs attaching must appear personally and prove their debt on oath: And a witness who was other than the plaintiff offering to swear was rejected by the judges of assize. But their judgment was reversed by the governor and council, who thereby only decided that an oath made by another than the plaintiff would be sufficient, and consequently that the evidence ought to have been received: which judgment of reversal was confirmed by the privy council on appeal; and therefore the other point, whether the assignees of *Woodbridge*, supposing they proved their debt, could recover against the garnishees, did not arise. There are besides several decisions expressly in point on this subject. In *Mackintosh* v. *Ogilvie* (b), Lord *Hardwicke*, Chancellor, granted a *ne exeat regno* against one who had obtained arrestments of a bankrupt's property in *Scotland*. And Lord *Mansfield*, then Solicitor General, said that there had been many instances, where, after such arrestments and foreign attachments by creditors, the money had been recovered back again by the assignees under the commission in actions for money had and received. Again in *Solomons*, attorney of the assignees of *Deneuffoilles* v. *Rofs* (c), where a creditor, who had attached a debt in the hands of one *Israel Rofs* a debtor of *Deneuffoilles*, coram *Bathurst*, J. (sitting for the Lord Chancellor, 1764); the money which had been paid into court by the garnishee on a bill of interpleader, and which had been invested in stock, was ordered to be transferred to the curators (assignees); and a note which the garnishee had given to the attaching creditor to be delivered up and cancelled. In *Jollet* and *Reuveld*,

(a) *Cockpit* 1785. This was cited for was read by Mr. J. Buller; and afterwards the defendant on the first argument. | by Lord Kenyon in giving judgment.

(b) *Hil. 21 Geo. 2.* a fuller note of this | (c) *H. Bl. Rep. C. B.* 131. n.

Curators.

Curators. v. Deponthier and Baril (a), attaching creditors, where *Baril* and *Texier* were garnishees, before Lord *Camden* 1769, where the bill was filed pending the attachment, a perpetual injunction was granted against proceeding in the attachment. And in *Neale* and another assignees of *Grattan v. Cottingham and Houghton (b)* before Lord *Lifford*, Chancellor, in *Ireland*, November 16, 1764, where the garnishee had been taken in execution, and had paid the money attached, in his own discharge, the plaintiff in the attachment was compelled to pay that money over to the assignees. From a review of the above authorities it appears clear that however the question may be as between subjects of this country and foreigners residing in the country where the bankrupt's property lies, yet certainly as between subject and subject in this country the courts will not sustain acts done by them in direct contravention to the policy of the laws to which they owe obedience: And the consent of every subject is virtually included in an act of parliament, as was said by Lord *Coke*, and also by Lord *Mansfield* in *Wadham v. Marlow (c)*. Neither can it be objected, that, the right of the defendant to this money having been determined by a foreign court of competent jurisdiction, this Court ought not virtually to rescind their judgment by this mode of action; for the proceeding in *Rhode Island*, was *res inter alios acta*; which distinguishes this case from *Burrows v. Femino (d)*. For the question as between these parties is perfectly collateral to the right as between the bankrupt individually and the defendant. Nor does it even appear that the assignees had notice of the attachment. Whereas it is plain that the defendant was bound by his notice of the proceedings under the commission, supposing that to have been necessary to determine this case.

Bower, contra. The opinions of foreign jurists can have no more weight here than the learning and eminence of their characters as individuals entitle them to; and this Court are equally competent to form an opinion upon the law of nations as they were. However, the authorities cited do not conclude this question: The *lex domicilii* is by them considered to be adopted under many restrictions. *Huberus* lays down three axioms; 1st, that the law of every country holds only within the limits of its own jurisdiction. 2d. That all persons are to be considered as subjects of a state who are resident within it, whether their residence be temporary or not. 3dly. That governments so far act with confidence to each other that they will recognize one

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another's laws provided they do not clash or interfere with their own, or injure their own subjects. Therefore where a subject of one state, having acquired property there, removes with it into another, the latter will protect him in the possession of it though acquired by other means than are allowed in that country; but still with the restriction before mentioned. And this restriction extends in many instances to contracts as well as to penalties. Mr. Justice *Wilmot* said in *Robinson v. Bland* (a), that there are numbers of contracts void by the common law which are good in foreign countries, as a contract for prostitution. Most of the cases collected in *Bruce v. Bruce* are cases of intestacies; and there the relation of the representative character is acknowledged in all civilized countries from motives of policy to induce foreigners to reside and trade there with security. As to the case of *Morris*, the lunatic, whose committee was permitted by the House of Lords to sue in *Scotland*, that went on the same principle, considering the lunatic as *civiliter mortuus*; though it is evident that the court in *Scotland* thought otherwise. And therefore neither the ultimate determination in that case, nor in the appeal from *Virginia*, nor the determination by the Chancellor of *Ireland* before the appellate jurisdiction was relinquished, are conclusive authorities to shew to what extent the *lex domicilii* is recognized in foreign countries by independent judicatures upon this subject. The question still is, whether it were not competent to the courts of *Rhode Island* to reject any notice of the bankrupt laws of this kingdom. And most surely this is one of those cases where, the policy of those laws in all their relations being justly to be doubted, a fair exception is afforded to the general rule; and where the complete adoption of them must necessarily interfere with the municipal laws of other countries. For if a subject of *Rhode Island* had been a creditor of the bankrupts, and had even after the commission issued here attached property of the bankrupts there, it is not to be supposed that the courts of law would have turned him round to seek his remedy under the commission in this country. It is said that this is a fraud by the defendant on the bankrupt laws; but that is begging the question. It must first be ascertained to what extent those laws operate, and under what circumstances property is to be bound by them. The distinction taken by Lord *Mansfield* in *Cleve v. Mills* that the assignment under the commission was to be considered out of *England* as a *voluntary* assignment between the bankrupt

(a) 1 *Blac. Rep.* 262.

and his assignees, but did not affect other creditors, seems to be the true line; and therefore if no other creditor had first obtained possession abroad, the courts there would have lent their aid to the assignees to collect the bankrupt's debts. They would then have stood in the same situation as any other creditor. And Lord *Hardwicke* must undoubtedly have entertained the same notion, when he imagined that the only relief he could afford against a creditor who had attached *Wilson's* property in *Scotland* was to refuse to let him prove under the commission here till he made the other creditors even. With regard to *Mackintosh v. Ogilvie*, the issuing of a writ of *ne exeat regno* to prevent the creditor attaching property abroad belonging to the bankrupt rather proves that it was the opinion of the Court that such attachment if suffered to take place would be effectual, otherwise the issuing of the writ was nugatory: and what was said by the Solicitor General was the mere suggestion of counsel, unsupported by any authority. The utmost it amounts to was that the case passed *sub silentio*. And the determination in *Wilson's* case was subsequent and contrary thereto. Besides, it is admitted that the penal laws of one country do not extend to another; and the bankrupt laws are altogether confiscatory in their nature. Neither would the supposed equivalent of a certificate avail in such a case; for how does it appear that the bankrupt's certificate would discharge his debts contracted in a foreign country, if he or his property were to remove within its jurisdiction. But even the civil writers (a) have made a distinction, in treating of the operation of the *lex loci*, as to whether the proceeding is in *personam* or in *rem*. The property attached by the defendant was within the jurisdiction of a foreign state, who would not take cognizance of our bankrupt laws, and the defendant's title to this specific property has been solemnly determined by a Court of competent jurisdiction. It was a judgment in *rem*, and therefore it must be taken that the party, in whose hands it was, had full notice of the proceeding, and made every defence that the matter would admit of. And in *Galbraith v. Neville* (b) Lord *Kenyon* was of opinion that complete credit should be given to such judgments. It is also worthy of consideration that if transactions of this nature may be over-hauled, the subjects of this country will be put in a more disadvantageous situation than foreign creditors, who will be at liberty to attach the bankrupt's

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(a) *Vide Voet. b. 5. tit. 56, 57.*(b) *Vide Dougl. 5. b. note [C 2]*

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property abroad, to the prejudice of our own subjects, and without any benefit to the bankrupt's estate.

Cur. adv. vult.

Lord KENYON, Ch. J. now delivered the opinion of the Court.

In the argument in this case many quotations were made from the writers on the civil law, which it is not necessary to consider in determining this question. Generally speaking, it must be admitted that personal property must be governed by the laws of that country where the owner is *domiciled*. Neither do we mean to break through the rule that the courts of one country ought to pay a proper deference to the decisions of the Courts in another having competent jurisdiction, where the facts on which the decision was made were fairly disclosed to such court. But the general question here is whether the assignment, which was executed by the commissioners of the bankrupt, was sufficient to vest the bankrupt's property in the plantations abroad in the assignees under the commission; because if it did so vest at the time of the assignment, it is immaterial to consider in this case how far the relation under the bankrupt laws should take effect in *Rhode Island*, since the assignment was executed anterior to the time when the attachment suit was there commenced. Therefore the only question here is whether or not the property in that island passed by the assignment in the same manner as if the owner (the bankrupt) had assigned it by his voluntary act. And that it does so pass cannot be doubted, unless there were some positive law of that country to prevent it. Every person, having property in a foreign country, may dispose of it in this: though indeed if there be a law in that country, directing a particular mode of conveyance, that must be adopted; but in this case no law of that kind is stated, and we cannot conjecture that it was not competent to the bankrupt himself, prior to the bankruptcy, to have disposed of his property as he pleased. Now the bankrupt statutes have expressly enacted that the commissioners may assign all the property of the bankrupt in the most extensive words; and therefore on the general reason of the thing, if there be no positive decision to the contrary, no doubt could be entertained but that, by the laws of this country, uncontradicted by the laws of any other country where personal property may happen to be, the commissioners of a bankrupt may dispose of the personal property of a bankrupt resident here, though such property be in a foreign country. Then let us consider the decisions, which have been made on this subject.

subject. The case of *M^cIntosh v. Ogilvie* (a) agrees with our opinion. There it is to be observed that Lord *Hardwicke*, on his being told that the defendant in that case had not obtained a *sentence before the bankruptcy*, said, "Then it is like a foreign attachment, by which this Court will not suffer a creditor to gain priority, if no sentence were pronounced before the bankruptcy." In another part he intimated a strong opinion that the property in *Scotland* should not be taken by one creditor to the prejudice of the rest of the creditors here. And at the close of that case the Solicitor General observed that this precise question had been determined. But the case of *Beckford v. Turner* was relied on, when this case was first argued, as a determination in favour of the attachment creditor: but certainly no question of that kind was stated among the reasons signed by the counsel, nor was it brought in judgment in that case; the single question there was whether or not the proceedings in the island of *Jamaica* were conformable to the mode pointed out by the act of assembly there. And if it had been stated in the reasons signed in that case, this question could not have arisen in deciding it. There was indeed a *dictum*, rather than a decision, in *Wilson's* case that the assignment by the commissioners had no other effect than a *voluntary* assignment. I believe the doubt in all these cases has arisen from not attending to the meaning of the word "voluntary". It has been contended that it means "without a valuable consideration": but it is impossible to consider it in that light; for in the case of a bankruptcy there must be a consideration: it means the bankrupt's own *voluntary* act, as contradistinguished from a *compulsory* act by law. Therefore on the reason of the thing, even without any authorities, we have

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(a) *H. 21 Geo. 2. In Chancery.*—"The plaintiff was the assignee of a bankrupt, the defendant a creditor, who before the bankruptcy went into *Scotland*, and made arrestments on debts due to the bankrupt from persons there. Upon an affidavit of the defendant's having got this money into his hands, a *ne exeat* was granted. And a motion was now made on the behalf of the defendant to discharge it upon a supposition that he had a right to the goods as creditor by his arrestments.

"The Lord Chancellor asked whether he had sentence before the bankruptcy, and, being answered in the negative, he said "Then it is like a foreign attachment, by which

this Court will not suffer a creditor to gain priority, if no sentence were pronounced before the bankruptcy. I cannot grant a prohibition to the court of sessions: but I will certainly make an order on the party here to restrain him from getting a priority, and evading the laws of bankruptcy here. If the gentleman were not going abroad, I would do nothing; but as he is, I will not discharge the writ without his giving security to abide the event of the cause."

"N. B. The Solicitor General said there had been cases where creditors had got a priority, and after coming here have been obliged to refund in a court of law in an action for money had and received."

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no difficulty in saying that the title of the plaintiffs must prevail. For it must be remembered that during the progress of this business all these parties resided in *England*; that the defendant, knowing of the commission and of the assignment, in order to gain a priority, transmitted an affidavit to *Rhode Island* to obtain an attachment of the bankrupt's property there, in violation of the rights of the rest of the creditors, which were then vested: but such an attempt cannot be sanctioned in a court of law. But in addition to these reasons, the decisions which have been made on this subject remove all doubts whatever. It is not necessary to go through them, because they were mentioned in the argument, and are collected in *H. Bl. Rep. C. B.* 131, & 132. n; *Salomons v. Ross*, before Lord Bathurst; *Jollet* and another v. *Deponthien* and *Barril*, before Lord Camden; and *Neale* and another v. *Cottingham* and another, in *Ireland*, before Lord Chancellor Lifford. The second of these I have reason to believe was considered by Lord Camden as a very clear case; for he did not think it important enough even to make a note of it in his book. And although the last case was not decided in this country, yet it was determined by a very respectable authority, Lord Lifford, assisted by several of the judges, and that noble lord was conversant with the laws of this country, having sat on the bench here for several years before he went to *Ireland*: and we know also that *Davis's* reports of the decisions in that country are cited as authority here. There are therefore these three decisions, in addition to the case before Lord Hardwicke, in support of our opinion; and there are none to the contrary, except indeed what was said in *Wilson's* case, and that seems to have turned on mistaking the import of the word "voluntary".

We are therefore clearly of opinion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

Monday,
Feb. 7th.

MACLELLAN against HOWARD.

A defendant
cannot plead
non assumpsit
as to the
whole and a
tender as to
part.

BURROUGH moved to discharge a rule which the defendant had obtained to plead double, namely, *non assumpsit* as to the whole, and a tender as to part, which he contended was inconsistent; and he relied on the practice, and on *Kay* and *Patch* (a) where this point was settled.

(a) *Tr. 27 Geo. 3. B. R.*

Gibbs, who opposed this in the first instance, said that it was discretionary in the Court to grant or to refuse rules to plead double, and that it might in many instances be a great hardship on a defendant not to be permitted to plead in this mode; as if, in order to put an end to the suit, he had tendered a small sum. But

Per curiam. The defendant cannot be permitted to plead *non assumpsit* to the whole and a tender as to part; because if the general issue be found for the defendant, it will then appear on the record that no debt is due and yet that the defendant admits something to be due. And they made the

Rule absolute to set aside the rule to plead double.

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THOMSON *against* RYALL.

Tuesday,
Feb. 8th.

TO a plea of a judgment recovered the plaintiff replied *nil tiel record*, which he delivered with a rule to return the paper book in four days. This rule expired on the *Saturday*; but the defendant did not offer to return it till the *Monday* morning following before the opening of the Judgment Office, when the plaintiff refused to receive it, and immediately signed judgment. A rule having been obtained to shew cause why the judgment should not be set aside;

Baldwin now shewed cause; and relied on *Hafelar v. Ansell* (a), where it was expressly decided that the party is bound to return the paper-book on the fourth day.

Marryat, in support of the rule, said that that case was directly contrary to another in the same book, *Oxley v. Bridge* (b); where it was held that when a day is fixed for pleading &c, that day is considered as continuing till the office opens the next morning. In that case too the defendant actually gained a term by not complying with the rule on the fourth day; whereas in this case no such advantage could be gained, because the plaintiff cannot have judgment of this term. And the rule laid down in *Oxley v. Bridge* seems to have been recognized in a case (c) subsequent to that of *Hafelar v. Ansell*, where a judgment of *non pros* was set aside on the ground that the issue roll was carried into the office before the judgment was actually signed, *though after the expiration of the rule for bringing it in*: and it was compared to the case of a plea, where if it be not put in on the day the rule expires, and the other party does not take advantage of it im-

On a rule to plead, reply, &c, in four days, if the party on whom the rule is made delay complying with it till the morning of the fifth day, the adverse party may refuse to receive it, and sign judgment.

(a) Dougl. 197.

(b) Dougl. 67.

(c) Minns v. Baxter, ante 1 vol. 16.

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mediately, he may deliver his plea any time before judgment is actually signed against him: now the returning of the paper-book is as a plea, for it is to be returned with the rejoinder. But

The Court, after observing that it was difficult to reconcile the different cases on this point, said that the latest, that of *Hafelar v. Ansell*, warranted the judgment in this case; and that that case was decided after consulting the officer of the court.

Rule discharged.

Wednesday,
Feb. 9th.

The KING against The Inhabitants of St. PETROX,
in DARTMOUTH.

Serving 40 days under an indenture of apprenticeship to an infant will give a settlement.

Money given by the parish officers (in the case of a voluntary binding) as the consideration of taking an apprentice is not liable to the duty imposed by the 8 An. c. 9. s. 35; for it comes within the exception to it in s. 40. as being at the public charge of the parish. Neither is any duty payable for any consideration money, unless it be given to the master or mistress of the apprentice.

TWO justices removed *Ann Hambling* and her two children from *St. Petrox* in *Dartmouth*, to *Slapton*, both in the county of *Devon*. The sessions on appeal quashed that order, subject to the opinion of the Court on the following case.

John Hambling the father of the pauper's husband *John Hambling* deceased, having been told by the parish-officers of *Townstall*, that they would give him 20 s. to bind out his son an apprentice if he would find a place for him, did in *July* 1768 agree with *Mary Hayne* widow, who occupied a farm in *Slapton*, to bind his son *John Hambling* deceased, then aged about eight years, an apprentice to *Richard Hayne*, son of *Mary Hayne*, who was then between the age of 14 and 15, and was then resident in his mother's house as a part of her family, and had no habitation or business of his own. When this agreement was made between *Hambling* the father and *Mary Hayne*, they also agreed that he, *Hambling*, should pay to *Mary Hayne* 20 s. as a consideration for such apprenticeship, but it did not appear that *Mary Hayne* knew that any promise was made by the overseers of *Townstall* to *Hambling*, with respect to the advancing of any money to him for this purpose. *Hambling* the father afterwards received 20 s. from the churchwardens and overseers of *Townstall*, 5 s. of which he paid to *Mary Hayne*, and promised to pay her the rest at 5 s. a time, but applied the remaining 15 s. to his own use. It appeared by the indenture of apprenticeship, dated 21st *July* 1768, that *John Hambling*, the son, of his own free will and with the consent of his father, voluntarily bound himself apprentice to *Richard Hayne* of *Slapton* till he should attain the age of 21, to learn the art of husbandry. This indenture was signed by

Hambling

Hambling the father, and *Hambling* the son, and by *Richard Hayne*; and was stamped with an half crown stamp (a), but had no stamp thereon for the consideration money. Sometime in *April* previous to the date of the indenture, *J. Hambling* the father received from the parish of *Townstall* five shillings as need money, he having applied for relief. The case also stated that *J. Hambling* the son lived in *Mary Hayne's* house in *Slapton*, till he was 20 years old.

Morris, and *Clapp*, in support of the order of sessions, admitted that no advantage could now be taken of the infancy of the master, for that only rendered the indenture voidable, but contended that it was void for want of the additional stamp, required by the statute of *Anne* (b), denoting the 6*d.* duty on the consideration money. For though the 20*s.* were not actually paid, yet part of the sum was, and the remainder was *agreed* to be paid; and the statute attaches on all consideration money "paid, agreed, or contracted for." And the mother of the infant must be considered as the agent for her son in receiving the 5*s.* and agreeing for the remainder; for it cannot be denied but that she acted as agent for her son in some part of the transaction, and then she must be so considered in every part; and the 35th section speaks of money given to, or to the use of, the master. But if she be not taken to be the agent for her son, then it was only a nominal and colourable binding to the son, but substantially a binding to the mother, in which case this was a fraud on the revenue laws, and the whole contract fails. And though, where fraud consists merely in matter of fact, the sessions must find the fraud, yet that is not necessary where the fraud is an inference of law, or a compound of fact and of law. Neither does this case come within the subsequent proviso (c) in the statute, which exempts from this duty all money given with apprentices, "who are placed out at the common or public charge of any parish, or by or out of any public charity." For the latter there is no pretence in this case, and the former only relates to compulsory bindings under the stat. 43 *Eliz. c. 2*; for there is no other binding of a parish apprentice than that by the parish-officers with the consent of two magistrates. Now this was not a binding of that description; and there cannot be any constructive binding under that act, for neither the magistrates or the parish officers can delegate their duty or their trust to any other persons. If then the duty of sixpence in the pound were payable for this consideration money, the indenture is absolutely

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(a) Which was then the proper stamp.

(b) 8 *An. c. 9. s. 35. 36.*

(c) *S. 40.*

"void,

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"void, and not available in any court or place, or to any purpose whatever;" sect. 39.

Lens, and *East*, *contra*, were stopped by the Court.

Lord KENYON, Ch. J. It has been very properly admitted that this indenture of apprenticeship was not absolutely void, on account of the infancy of the parties, but only voidable, and that, unless there be some other objection, the pauper is entitled to the benefit of the apprenticeship. But it has been contended that it is void on another ground, namely, for the want of an additional stamp for the consideration money of 20 s. given with the apprentice, and that this does not come within the proviso, in the statute of *Anne*, relative to sums given with apprentices *at the public charge of any parish*, or by or out of any public charity. But I think there is no foundation for the argument. We must consider this to be a fair binding to the son, because the sessions have not stated that it was fraudulent. Then if it were, as it professed to be, a binding to the son, and not colourably to the mother, the statute requires no duty for the consideration money, even though the money were not raised at the charge of the parish. The act of parliament, taking it altogether, undoubtedly imposes the duty on money paid to the master or mistress only; for it says, "that every master, or mistress, to or with whom, or to whose use, any sum shall be given, paid, secured, or contracted, for or in respect of any such apprentice &c." Now here the master did not receive the money which was given with the apprentice, but for reasons (not here stated) his mother received it; and it is not stated that she received it *as agent for her son*. But even supposing that the master had received or contracted for the consideration money, it was not subject to the duty imposed by the statute of *Anne*, because it was money raised at the common and *public charge of the parish of Townstall*, and as such it comes within the proviso in that act. It was assumed, in argument, as a proposition that there can be no binding of any parish apprentice within the meaning of this proviso, unless it be a compulsory binding under the 43 of *Elizabeth*, with the concurrence of two magistrates. But that cannot be the construction of that statute; for one of the purposes of raising rates for the relief of the poor was to put out children apprentices, at the expence of the parish. That is not restrained to the case of a compulsory binding, which is under a subsequent clause. And the object of that act is as well answered by a binding with the consent of the parents as by a compulsory binding without their interference. All that is required is that the binding should be obligatory on the children. If the parents dis-

charge

charge their duty to their children, then there is no necessity for the interference of the magistrates and parish officers: but if the parents neglect their duty, or are not able to procure masters, then the parish officers are bound to interpose, and they stand in *loco parentum*. Then in this case the consideration money was advanced by the parish officers; it came out of a fund excepted by the statute of *Anne*. Therefore on both the points, first, that there was no money for which any duty was payable under any circumstances, or secondly, (if there were) that it was excepted in this case, as the money was paid at the public charge of the parish, I am of opinion that the pauper gained a settlement in *Slapton* by serving under this indenture; and consequently that the order of sessions should be quashed.

ASHHURST, J. It is not necessary to go into the first objection, that the money was paid to the master of the apprentice, and not to his mother, because the other objection is decisive, namely, that this money was paid out of the public fund of the parish. Though the Legislature, in passing the statute of *Elizabeth*, might have chiefly provided for the case of a compulsory binding, yet it cannot be supposed that that act does not extend to voluntary bindings at the public charge of the parish. This was a binding at the public expence of the parish, and therefore comes within the exception in the statute of *Anne*.

GROSE, J. (a). declared himself of the same opinion.

Order of sessions quashed.

(a) Absent Buller, J.

The KING *against* The Inhabitants of COLLINGBOURN DUCIS.

Wednesday,
Feb. 19th.

THE pauper *E. Chandler*, and his wife, were removed from *Collingbourn Ducis* to *Collingbourn Kingston*; the Sessions, on appeal, quashed the order of justices, and stated the following case.

The pauper (*E. Chandler*.) was born in *Collingbourn Kingston*, when his father and mother were residing there under a certificate from *Froxfield*. At the age of 19 he was hired for a year to serve *T. Childs* of *Buckbolt Farm*, as a carter, which he served accordingly. *Buckbolt Farm* is extraparochial; is not a township or vill; and has no parish officers. After the pauper had served the year at *Buckbolt*, he returned to *Collingbourn Kingston*, and then, being unmarried, under age, and not having done any act

The infant son of a person, living at *A.* under a certificate, served a year at *B.* (an extraparochial place) under a yearly hiring, and then returned to *A.* under 21, where he was hired, and served a year; it was held that he gained no settlement in *A.*

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against
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tants of
COLLING-
BOURN
DUCIS.

to gain a settlement in his own right, further than as aforesaid, he was hired to, and served, *S. Andrews* of that parish for a year.

The court of sessions, being of opinion that the pauper was not emancipated, and that the certificate was not discharged so as to enable him to gain a settlement in *Collingbourn Kingston* by hiring and service, quashed the order of the two justices.

Caldecott, Litchfield, and Durnford, in support of the order of sessions, were stopped by the Court.

Le Mesurier, contra, said that the question as to whether the certificate was discharged depended on the question whether the pauper had any intention at the time he quitted *Collingbourn Kingston* of returning thither again; for if he did not so intend, the certificate as to him was discharged, according to *Rex v. Newington (a)*; and then he was in a capacity of gaining a subsequent settlement in that parish when he returned, which he did by hiring and service. Now if he had gone in the mean time to any parish, instead of *Buckholt*, and hired himself as he did there for a year, it is not pretended but that for the purpose of discharging the certificate, he must have been said to have quitted *Collingbourn Kingston* without any *animus revertendi*: then the mere circumstance of *Buckholt* being an extraparochial place cannot make any difference; for the inference from his acts of his intention to leave his father's family and look out for another home for himself must be the same in both cases. And, therefore, though he could not gain a settlement in *Buckholt*, yet it was competent to him on his return to gain one in *Collingbourn Kingston* by hiring and service. But if it be contended that this must depend on the question of emancipation, it is to be observed that it differs materially from all the cases wherein sons have been held not to be emancipated. The determinations on this point have proceeded, not on the fact of infancy, but, on the broad ground of the son's having separated himself from the father's family. In all those cases the father put the son out either to service or apprenticeship; here the son put himself out. In *R. v. Stretton (b)*, the father put the son out and received his wages, which brought the case within the observation made by *Buller, J.* in *R. v. Witton cum Twambrookes (c)*, that the son remained under his father's power the whole time. In that case also Lord *Kenyon* remarked, upon the case of *Walpole St. Peter's (d)*, that going for a soldier was an emancipation, because it was contracting a relation inconsistent with his remaining a dependent member of his father's family. Now that reason holds

(a) *Ante*, 1 vol. 354. (b) *H. 25 Geo. 3.* (c) *Ante* 3. vol. 356. (d) *Bur. S. C.* 638.

equally

equally in the present case; for the relation of a servant which the pauper contracted to another master, is just as inconsistent with his dependence on his father, as his enlisting for a soldier and serving the Public. In *R. v. Pelham*, as it is reported in *Bott (a)*, 130. this very question seems to have been decided.

Lord KENYON, Ch. J. It is extremely clear that, if the pauper had served a year under a yearly hiring in *Collingbourn Kingston*, before he went to *Buckholt*, he could not thereby have gained a settlement in that parish while the certificate was in force, on account of the statute of *William*. It is equally clear that if *Buckholt* had not been an extraparochial place, his service under the hiring stated in the case would have discharged him from the protection of the certificate in *Collingbourn Kingston*; because then the certificate, which asserted that he was settled in *Froxfield*, would not have been true in fact, inasmuch as it would in that case have been superseded by a subsequent settlement. But *Buckholt* not being a parish wherein a settlement could be gained, the question is, whether by any, and what means, the certificate as to this pauper was discharged. In cases of this kind, where the decisions of this Court are to guide the judgments of the magistrates, it is of great importance that they should be consistent. Now I am not able to distinguish this case from the principle laid down in *R. v. Witton cum Twambrookes*. It was there held that a person under age, who after being absent from his father's family for a considerable time, returned to it before he was an adult, or married, and before he had acquired a settlement for himself, was not emancipated, but was entitled to the benefit of his father's settlement. So in this case the son returned before he had attained the age of 21, not having gained any settlement for himself distinct from that of his father, nor having become the head of a family, and therefore this case must be governed by that of *Witton cum Twambrookes*. The distinction, which has been attempted to be taken between some of the former cases and the present, that here the son put himself out to service, is not material; for till the age of 21, not having done either of the acts above alluded to, he continued a part of his father's family.

ASHHURST, J. and (b) GROSE, J. of the same opinion.

Order of sessions confirmed (c).

(a) But this case is also reported by Sir J. Str. 1147. who argued the case himself; and who states the question to have turned solely on the construction of 12 Ann. c. 18. whether the apprentice of a certificated person, assigned to a second master in another

parish, could gain a settlement by serving in such other parish.

(b) Absent Buller, J.

(c) *Vid. R. v. Broadbenbury*, H. 25 G. 3. *Cald.*

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The KING
against
The Inhabi-
tants of
COLLING-
BOURN
DUCIS.

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Thursday,
Feb. 10th.

The 26 G. 2.
c. 6. § 1.
enacts that
all persons
going on
board ships
coming from
infected
places shall
obey such
orders as the
king in coun-
cil shall make,
without an-
nexing any
particular
punishment;
the disobedi-
ence of such
an order is
an indictable
offence, and
punishable as
a misdemean-
or at com-
mon law.

The KING against JAMES HARRIS.

THIS was an information by the Attorney General; the third count of which stated that in July 1782, an order was made by the king in council, whereby it was ordered that, if any pilot, or other person, should go on board any ship or vessel obliged to perform quarantine, such pilot or other person should perform quarantine in like manner as any person coming in such ship or vessel should be obliged to perform the same; that the order was published in the Gazette in the same month, and has ever since been in force; that the defendant, well knowing the premises, but having no regard to the laws and statutes of this realm, afterwards, on the 8th of June 1788, &c, with force and arms went on board a certain ship called *The Stephen*, which was obliged to perform quarantine, in order to conduct the same into the port of *Bristol*, and did not perform quarantine in like manner as any person coming in the said ship or vessel was obliged to perform the same, but that the defendant on the 14th June 1788, with force and arms, unlawfully quitted the said ship by going on board a certain other ship or vessel in a certain place within his majesty's dominions, before the ship (*Stephen*) had fully performed and been discharged from such quarantine; he the said defendant not being in any manner, or in any case, or by any license, directed or permitted by any order made by his majesty in council so to do; in contempt &c; to the evil example, &c; against the peace &c; and also against the form of the statute &c. The fourth count differed from the former in this respect only, that this charged the defendant with quitting *The Stephen*, by going on shore in a certain other place within his majesty's dominions &c.

At the Sittings at *Westminster* before Lord *Kenyon* the defendant, who was a pilot, was found guilty.

It is enacted by the 26 Geo. 2. c. 6. § 1. That all ships, and all persons, and goods, on board, coming into any port in *England* &c, from any place where the king with the advice of his privy council shall judge it probable that the infection may be brought, shall be obliged to make quarantine in such place, for such time, and in such manner, as shall be directed by order by the king in council &c; and that until such ships, persons, and goods, shall have respectively performed such quarantine, no such person, goods, or merchandizes, or any of them, shall come or be brought on shore, or go or be put on board any other ship or vessel in any

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against
HARRIS.

any place within his majesty's dominions, unless in such manner, and in such cases, and by such license, as shall be directed or permitted by such order, or orders, made by his majesty, &c, in council as aforesaid; and that all such ships, *and the persons,* or goods, coming or imported in, or *going or being put on board the same,* and all ships, vessels, boats and persons receiving any goods or persons out of the same, *shall be subject to such orders, rules, and directions, concerning quarantine,* and the prevention of infection, *as have been or shall be made by his majesty &c, in council,* and notified by proclamation, or published in the *London Gazette* as aforesaid. By the fifth section it is enacted, That if any *commander,* or other person having charge of any ship liable to perform quarantine, having notice thereof, shall himself quit, or shall knowingly permit or suffer any seaman or passenger coming in such ship to quit such ship, by going on shore, or by going on board any other ship, before such quarantine shall be fully performed, unless in such cases and by such proper license as shall be directed or permitted by such order or orders made or to be made concerning quarantine, and the prevention of infection as aforesaid; or in case any commander, or other person &c, shall not, within convenient time after due notice given for that purpose by the proper officer, cause such ship, and the lading thereof, to be conveyed into the place or places appointed for such ship and lading to perform quarantine respectively; then, and in every such case, every such commander, &c, for every such offence shall forfeit 500*l.* one moiety to the king, and the other moiety to him or them who will sue for the same; and also if any person shall *so* quit such ship, by going on shore, or by going on board any other ship, contrary to the true meaning of this act, it shall and may be lawful for all persons whatsoever, by any kind of force and violence, to compel such person to return on board such ship or vessel; and *every such person so quitting* such ship or vessel shall for every such offence suffer imprisonment for six months, and shall also forfeit 200*l.*

The Attorney General, and Bearcroft, now prayed for the judgment of the Court; which they said was discretionary, under the first section of the statute, as in the case of a misdemeanor at common law. For though when an act of parliament creates a new offence, and in the same clause gives a specific punishment, the Court have no discretion, but must inflict that punishment; yet when the offence is created by a separate substantive

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clause, the Court may give a general judgment for that offence, as in the case of a misdemeanor, notwithstanding there be another section in the same statute, giving a specific punishment. Now this case falls within the latter description; for the first section is merely mandatory; it commands persons going on board particular ships to obey such order as the king in council shall make, without directing any particular punishment for the disobedience of that order: then it follows that the disobeying such order is a misdemeanor, for which the Court may give a general judgment of fine, or imprisonment, or both. This is not like the case of *R. v. Lookup (a)*, which was a conviction on the 9 Ann. c. 14. s. 5; for there the same clause, which created the offence, directed the mode of proceeding, and gave a specific punishment. Or the Court may give judgment for the six months imprisonment under the fifth section, which punishment cannot be inflicted in any other mode of proceeding; for if a common informer were to bring a popular action, he would only recover the penalty.

Garrow, for the defendant, said that the punishment of six months imprisonment directed by the fifth section was for a different offence from this, and applicable only to those persons who came in the ship from the infected place; and that it was not enacted by the first section that the party should be subject to the penalties in the act of parliament, but merely to such order as the king in council should make. He suggested a doubt whether any punishment could be inflicted on this defendant, because he did not quit the ship till three days before the expiration of the quarantine, and the boat in which he went when he left the ship did not reach land till after the time was actually expired; but he observed that (if the defendant were liable to any punishment) the offence of which he had been guilty was not only very inferior to that of the persons who came from the infected place and broke quarantine, and for which the six months imprisonment was inflicted, but the most trifling of which he could be guilty under this act of parliament.

Lord KENYON, Ch. J. By the first section in this act of parliament the king is authorised to make such orders in council, respecting persons going on board ships which come from infected places, as he shall be advised. Now this indictment states that the king in council made an order in pursuance of

(a) *Str.* 1048.

this act, which the defendant violated; and therefore, without advert-
ing to the other clauses in this act of parliament, which are adapted to other offences, the question is whether or not the disobedience of an order thus made by the king in council be not an offence at common law? And most unquestionably it is. This question, or at least the principle of it, does not now arise for the first time. In *R. v. Robinson* (a) the defendant was indicted for disobeying an order of maintenance of his grandchildren. The statute 43 *Eliz. c. 2. s. 7.* enacts that fathers, grandfathers, &c. shall maintain their children, and grandchildren, &c. in such manner as the justices shall direct; and it annexes the penalty of 20*l.* per month; to be recovered in a summary way by distress, &c. under the eleventh section. The prosecutor in that case however thought proper to prefer an indictment against the defendant for disobeying an order of justices made upon him; and, after verdict, a motion was made in arrest of judgment, which was argued very ably, on the ground that as the act of parliament had annexed a specific punishment, and prescribed a particular mode of proceeding, it was not an indictable offence. But the Court, after great deliberation, were clearly of opinion that, though the act of parliament had given the justices power to make the order, the breach of it was indictable as a misdemeanor at common law. So here, this statute gave authority to the king in council to make the order in question; and the disobeying it becomes an indictable offence at common law.

ASHHURST, J. It is a clear and established principle that, when a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause, on the ground of its being a misdemeanor. Now here the defendant has been guilty of a breach of the first section of this act of parliament, which expressly gave power to the king in council to make orders relative to persons going on board ships liable to perform quarantine; for the indictment states that the king in council made an order on this subject, which it was competent to him to make, and that the defendant disobeyed it. For this he is clearly punishable, as for a misdemeanor at common law. This renders it unnecessary to make any determination on the fifth section of the act: but if it were necessary to consider it, I should think that it relates only

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(a) 2 Burr. 799.

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to the officers and passengers who came on board the ship from the infected place, and not to persons going on board after her arrival here.

BULLER, J. On the first clause in this act of parliament, coupled with the order in council, there is no doubt but that the defendant may be punished upon a common law indictment. I agree also with my brother *Ashhurst* that the defendant is not within the meaning of the fifth section; which is material to be considered, on account of the punishment to be inflicted on him; because if he be liable to be sued hereafter for the 200*l.* penalty, we should not inflict the same punishment, as if he were not liable to that penalty. Now that section subjects the *captain* to a penalty of 500*l.* for quitting the ship himself, or for suffering any seaman or passenger so to do; and then the Legislature considered what punishment should be inflicted on the *seamen or passengers* quitting the ship; and enacted by the latter part of the same section that they should be imprisoned for six months, and should forfeit 200*l.* For it says "if any person shall *so* quit such ship &c", namely those persons before described, "the seamen and passengers"; and it proceeds to enact that "every *such person* so quitting &c, shall forfeit 200*l.*" This section therefore wholly relates to the captain, seamen, and passengers, and not to persons in the defendant's situation.

GROSE, J. The act of parliament having given power to the king in council to make the order in question, and not having annexed any specific punishment to the disobedience of it, it is undoubtedly a common law offence, and must be punished accordingly.

ASHHURST, J. then pronounced the judgment of the Court on the defendant, that he be imprisoned in the King's Bench prison for a year.

Friday,
Feb. 11th.

BROUGH against WHITMORE.

Provisions
sent out in a
ship for the
use of the
crew are pro-
tected by a
policy of as-
surance on
the ship and
furniture.

THIS was an action on a policy of insurance on an *East India and China* ship; and on the tackle, ordnance, ammunition, artillery, and *furniture* of the ship. At the trial before Lord *Kenyon* at the *Guildhall* sittings it appeared that, while the ship was lying off *Bank-Saul Island* in the river *Canton*, it became necessary to refit her, for which purpose the stores and provisions were taken out of her, and put into a warehouse, called

led a *Bank-Saul*, and that while they were in the warehouse they were destroyed by an accidental fire. It was admitted that the policy covered all the articles but the provisions, which were merely for the use of the ship's crew: but if those provisions were not protected by the policy, then there was not an average loss of 3*l.* *per cent.* It was considered in the same light as if the accident had happened on board the ship (a). For the defendant it was contended that the provisions were not protected by the insurance: but one of the jury (b) said that it had been determined in Lord *Mansfield's* time that they were included under the word "furniture", under which decision the merchants in the city had since acquiesced; on which the plaintiffs obtained a verdict.

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BROUGH
against
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Erskine, on a former day in this term, renewed his objection, and obtained a rule to shew cause why a new trial should not be granted; on the authority of *Robertson v. Ewer*; *ante* 1 vol. 127; and two *nisi prius* cases there mentioned. But the Court desired that some enquiry might be made respecting the case mentioned by one of the jurymen.

Piggott, and *Marryat*, now shewed cause. They said that they had not found the case mentioned at the trial, but stated the result of their inquiries in the city to be that the provisions, which were necessary for the use of the ship's crew, were always comprehended under the word "furniture"; and that underwriters had frequently paid the loss on such a policy as the present: but that provisions, which were shipped for any other purpose than the ship's crew, were like any other kind of merchandize insured by a policy on the goods. The counsel then observed that this case was distinguishable from that of *Robertson v. Ewer*, for there the loss happened by the extraordinary consumption of the provisions by the negroes during the detention of the ship: but here the provisions were merely for the ships crew, and were considered as part of the outfit. The case of *Robertson v. Ewer* arose on a policy on an *African* ship, in which provisions for the negroes as well as for the crew are usually sent: in that trade both the negroes and their provisions are considered as part of the cargo, and insured as such. In the two other cases referred to in *Robertson v. Ewer*, the demand was made for provisions consumed during the detention of the ship, and not when she was prosecuting her voyage. But this loss falls within the meaning of the policy, as it is understood

(a) Vid. *Pelley v. The Royal Exchange Assurance Company*, 1 Burr. 341.

(b) Which was a special one.

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BROUGH
against
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in the mercantile world; and though in some instances the courts of law have enlarged the terms of a mercantile contract, in order to meet the general ideas of merchants, yet there is no instance in which they have narrowed the construction of them. Whatever is necessary for a ship comes within the word "*furniture*", as it is used by the underwriters.

Erskine, in support of his rule, admitted that "*furniture*" included every thing which was necessary for the *accommodation or navigation* of the ship, but said that it did not, either in the ordinary acceptation of the word, or in the sense which had been put upon it in the Courts of law, comprehend "*provisions*". In *Robertson v. Ewer*, and the cases there cited, the Court decided on the broad ground that provisions are not protected by a policy on the ship and furniture, and not on the principle now suggested that the consumption of the provisions was occasioned by the detention of the ship, or by the negroes on board. In *Robertson v. Ewer*, Lord Mansfield said "There is no authority to shew that, on this policy, the insured can recover for such a loss; but it is contrary to the constant practice":—And again, "In this case it is admitted that there was no damage done to the ship, tackle, or *furniture*; and therefore I think the direction was right". If provisions were included in the term "*furniture*", there could never be a total loss after a consumption of any part of the provisions: and, in this case, the underwriter would be entitled to deduct the value of those which were consumed by the crew before the loss; and on that ground the defendant is entitled to a new trial, for the *quantum* was not left to the consideration of the jury.

LORD KENYON, Ch. J. On the trial of this cause I had nothing to guide my judgment on the construction of this instrument but the words of the policy; and when it was stated that "*provisions*" were included in the word "*furniture*", I confess I was somewhat at a loss to know to what extent the underwriters were liable on words so indefinite as these which are used. But I then thought, and still continue to think, that the rule of law is to be given (not by the merchants), but by the Court; though, when a question arises on the construction of the words of an instrument, which are in themselves ambiguous, it is a matter fairly within the province of those who alone act upon such instruments to declare the meaning of them. And I remember it was said many years ago that, if *Lombard Street* had not given a construction to policies of insurance, a declaration on a policy would have been bad on a general demurrer; but that

the uniform practice of merchants and under-writers had rendered them intelligible.

The question here arises on the meaning of the word "furniture;" one of the jurymen said, and in that he is now confirmed, that, according to the understandings of those who enter into these contracts, it includes the provisions for the use of the crew. Now, among the several accidents, against which the defendant insured, are *perils by fire*; and this ship being at *Canton*, it became necessary to refit her, and to take out all her goods and land them on this island, where the accident happened; by which these provisions, with the rest of the goods, were burned: and there is no doubt but that the loss on this island must be considered in the same light as if it had happened on board the ship itself. This was determined in *Pelly v. The Royal Assurance Company*. Then if these provisions be insured as part of the out-fit of the ship, and they were consumed by one of the perils insured against, there is an end of the question; a loss has happened within the meaning of the policy; and consequently the defendant is liable. But it was said in the argument that, the instant any of the provisions were consumed on board, there could not be a total loss: but the short answer to that is, that that comes within the wear and tear of the ship, and it might as well be said that if a mast were a little injured there could not be a total loss. If this decision were to militate against any determination, or even an *obiter dictum*, of Lord *Mansfield*, I should have hesitated for some time before I delivered my opinion. But the case of *Robertson v. Ewer* is clearly distinguishable from the present; here the goods were consumed by an accident by fire on board the ship, (for the island was for this purpose equivalent to the ship,) and within the meaning of the policy of insurance: but in that case they were consumed by the negroes during a detention of the ship.

ASHMURST, J. The case cited is not like the present, for the reason given; and I think that this loss comes within the terms of the policy. It is an undertaking to insure against all accidents which will prevent the provisions being applied to the purpose for which they were intended. These provisions were part of the outfit; they were consumed by fire, (one of the accidents against which the defendant insured) and consequently could not be applied to the purpose for which they were put on board.

BULLER, J. I am clearly of opinion that the underwriters on the body and furniture of the ship are liable to pay the amount of these provisions, which were bought to replace those which

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were consumed by an accident within the meaning of the policy. Without commenting on the words of the policy, it is sufficient to say that a policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument; but it is founded on usage, and must be governed and construed by usage. Now it is perfectly clear that in every instance, where losses have been settled, the provisions put on board the vessel when she sailed have been considered as part of the ship. The value is taken in this way; the under-writers have a right to go and see the ship, to examine the value of the hull, the masts, and the provisions; the value of the ship alone comprehends all these articles: but though the under-writers have a right to examine the ship itself, in point of fact they do not, because they know from experience the quantity of provisions necessary for the crew for the intended voyage; and if that value be stated to them in the ordinary way, they sign their names immediately, without making further enquiries. Then if the provisions be included in a policy on the ship; and the ship and all the provisions be lost, the under-writers must make good the whole loss, whether it be a valued or an open policy. But it has been said that, if an accident happen after some of the provisions are consumed, the under-writers are entitled to a deduction to the amount of such provisions: I will answer this, first, as the argument applies to a valued, and then to an open, policy. As to the first; from the nature of the policy, the provisions are not insured against all events; they are only insured against particular risks. Again, there is nothing from which there can be salvage; if the body of the ship and every thing on board be sunk, or burned, there can be no salvage. And, in the case of an open policy, the insured must prove by evidence what was the value of the whole, and then the same reasons apply as in the case of a valued policy. With respect to the case of *Robertson v. Ewer*, which has been relied on; I thought at first that it applied strongly to the present; and if I still entertained the same opinion, I would not, on account of any usage to the contrary among under-writers, overturn a solemn determination of this Court: but that case, and the two others there mentioned, are clearly distinguishable from the present. In all those the insured wished to charge the under-writers with the amount of the provisions consumed during the time when the ships were detained. Of those therefore it is sufficient to say that an insurance is *on the ship for the voyage*; but, during a detention, the ship is not proceeding; and therefore the under-writers are not liable.

liable. This case also differs from that of *Robertson v. Ewer* in another circumstance; there the provisions were consumed by the slaves on board, and not by the ship's crew, and the slaves are considered as part of the cargo. The words of Lord Mansfield in that case must be taken with a reference to the case then before him: He was then speaking of a charge for provisions used during the detention of the ship, and for the maintenance of the slaves; and he said, "there is no authority to shew that, on *this* policy, the insured can recover for *such a loss*; but it is contrary to the constant practice." Then he proceeded to say, "on a policy on a ship, sailor's wages or provisions are never allowed in settling the damages." Now even if those latter words be taken in their general sense, and not confined to the case immediately before the Court, they are accurate; for "provisions" *eo nomine* are not taken into consideration. In general, the captain of a ship takes on board provisions sufficient for the voyage; and if he be detained in any port, and he be a prudent man, he will not use what are called the ship's stores during his detention, but he will buy others for immediate consumption during the detention, because he cannot but know that he has the same length of voyage to perform that he had before he was detained: it makes no difference however to the underwriters whether he do so or not; for if the captain be obliged to purchase other stores for the remainder of the voyage, the underwriters are not answerable for these, but only for those which were on board at the time of the insurance, since they only formed a part of the value of the ship. On the whole therefore I am of opinion that there should be no new trial. The cases cited are distinguishable from the present; the usage of merchants, as to the construction of these instruments, stands unimpeached, and therefore it must prevail in this case.

GROSE, J. agreed.

Rule discharged.

SMITH and Others, Assignees of LEWIS and POTTER
against HODSON.

Friday,
Nov. 19th.

ASSUMPSIT for goods sold and delivered to the defendant by the bankrupts, before, and also by the assignees

If a bankrupt on the eve of his bankruptcy

fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods in trover: but if they bring *assumpsit*, they affirm the contract, and then the creditor may set-off his debt. Where the defendant lent his acceptance to the bankrupts on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet the defendant, having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to set-off the same under the words "*mutual credit*" in the 5 Geo. 2. c. 30. s. 28.

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since, the bankruptcy. Pleas *non assumpsit*, and a tender of 131*l.* 7*s.* 6*d.* which the plaintiffs took out of Court. There was also a set-off. At the trial at *Guildhall* before Lord *Kenyon*, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case.

In *August* 1787 *Lewis* and *Potter* sold goods to the defendant to the amount of 42*l.* and on the 4th of *March* 1788, they drew a bill on him at two months, for 442*l.* payable to their own order, although at that time he was indebted to them in 42*l.* only, which bill the defendant accepted. *Lewis* and *Potter* made the following entry in their books; "4th of *March* 1788, received from *James Hodson* an acceptance due 7th *May* 442*l.*; to bills and notes; to provide 400*l.*" On 26th *April* several bills were refused payment by *Lewis* and *Potter*, some of which were presented by bankers on behalf of the indorsees. On the 28th *April* 1788 the defendant went to the house of *Lewis* and *Potter*, and bought goods to the amount of 531*l.* 7*s.* 6*d.* which were sent to him with a bill of parcels the same day; the goods were sold to the defendant at six months credit. On the 29th of *April* 1788 *Lewis* and *Potter* committed acts of bankruptcy. On the 9th of *May* the commission issued, and they were duly declared bankrupts, and the plaintiffs chosen assignees of their estate and effects. The bill for 442*l.*, drawn by the bankrupts, and accepted by the defendant, became due the 7th of *May* 1788: the defendant did not pay it on that day, but in *September* following paid to *Gibson* and *Johnson* the holders thereof 200*l.* on account of the bill; and in *October* following before the six months credit upon the goods was expired, he paid the residue with interest. The jury thought the bankrupts gave an undue preference to the defendant in the sale; and gave a verdict for the plaintiffs, damages 400*l.* The questions for the opinion of the Court are; 1st, Whether the plaintiffs can support this action for the price of the goods? 2dly, If they can support this action, whether the defendant cannot set off against it the money paid by him on the above mentioned bill for 442*l.*

Russell, for the plaintiffs, was desired by the Court to confine himself to the second point, as they entertained no doubt upon the first. As to which he contended that though the sale were good to charge the defendant in this action, yet he was not entitled to support his set-off under the 5 *Geo. 2. c. 30. s. 28, (a).*

The

(a) Which enacts that where "there
" hath been *mutual credit* given by the
" bankrupt and any other person, or *mutual* " debts between the bankrupt and any other
" person, at any time before such person
" became bankrupt, the commissioners &c.
" shall

The words which will be relied on are *mutual credit*: But they were by no means intended to be used in so extensive a sense as the one now put on them by the defendant. The giving of *credit* is merely giving a future day of payment for a pre-existing debt; and to entitle a defendant to set it off, it must exist previous to the act of bankruptcy. As where goods are sold to be paid for at a future day, the vendee becomes a debtor for the value upon the delivery, though payment cannot be exacted from him till the day arrives: In the mean time the vendor is his creditor to that amount; and in that sense only is the word *credit* to be understood in the act. This appears further from the subsequent words of the statute; for the commissioners are directed to *state the account* between the parties, and claim or pay only so much as shall appear *due on the balance of such account*. In order therefore for a party to set-off any demand, it must be such as may be made an item in the account, and either certain or reducible to a certainty at the time of the act of bankruptcy committed. The act itself says, that the balance of the account is to be made appear "on setting *such debts* against one another;" which plainly shews that nothing more was meant by the word *credits* than *such debts* as were payable at a future day. Then how does the statute apply to this case. There was no debt existing between the bankrupts and the defendant at the time of the bankruptcy; nor was it certain there ever would be one; for in case of the defendant's bankruptcy or refusal to pay, the holder might have proceeded against the estate of the drawers and recovered the amount; and that perhaps after the defendant's acceptance had been admitted as an item of account between him and the bankrupts. And at all events no debt could arise till after payment by the defendant, which was long after the bankruptcy, and therefore could not be set-off; for at that time the bill was outstanding in the hands of third persons, and was therefore the subject of mutual credit, if at all, between them and the bankrupts. But in *Groome's* case (a) Lord *Hardwicke* was clearly of opinion that a debt arising on a contingency after the bankruptcy could not be set-off. And it has been determined that though a note indorsed after an act of bankruptcy may be proved under a commission against the drawer (b), yet

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"shall state the account between them, and
"one debt may be set against another; and
"what shall appear to be due on either side
"on the balance of such account, and on
"setting *such debts* against one another, and

"no more, shall be claimed or paid on
"either side respectively."

(a) 1 Atk. 119.

(b) *Ex parte Thomas*, 1 Atk. 73.

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it cannot be set-off against an action by his assignees (a). The cases *Ex parte Deeze* (b), *Ex parte Prescott* (c), and *French* assignee of *Cox v. Fenn* (d), were all of them cases where the bankrupts were actually indebted to the defendants, before the bankruptcies, in the sums which they set-off against the demands of the assignees; which differs them materially from the present. But even supposing this were such a demand as could in a fair transaction be set-off in a court of law under the statute, yet it cannot avail the defendant in this case, where the whole is vitiated by fraud. It therefore becomes material to examine what part of the transaction may be substantiated, and what is void. There is no fraud in the mere act of sale; and the defendant must be bound by that so far as he made himself liable for the amount of the goods: that would have been the case had the sale been made to a person who was no creditor of the bankrupt's. But the objection arises to the fraudulent use now attempted to be made of the sale. No party is entitled to set-off a demand against the assignees of a bankrupt, for which he could not have maintained an action, or which he could not have proved under a commission. Now if the defendant could not have done either in the present instance before the bankruptcy, he shall not be permitted to recover the amount indirectly in this manner; for that would be to permit him to avail himself of his own fraud.

Gibbs, for the defendant, insisted, first, that if the whole were to be considered as a *bonâ fide* transaction, the defendant was entitled to set-off the sum paid under his acceptance; and 2dly, That the finding of the jury, as to the undue preference, could not vary the case in favor of the plaintiffs in *this* action. The first question depends on the stat. 5 Geo. 2. c. 30. s. 28.; the true construction of which is that, wherever there is *mutual credit* between the bankrupt and another person before the bankruptcy, the debts may be set off against each other, although one of them may accrue after the bankruptcy, and although that one debt could not form an item of an account, so as to enable the bankrupt and such other person to strike a balance. The plaintiff's argument, that nothing can be set off under the statute, but that which may form an item of an account at the time of the bankruptcy, and the payment of which is only postponed for a time, directly militates against the decision of *French v. Fenn*. If that case

(a) *Marsh v. Chambers*, 2 Str. 1234,
(b) 1 Atk. 228.

(c) *Ib.* 230.

(d) *Tr. 23 Geo. 3. Co. Bk. L.* 2d. ed.

be law, the construction now attempted to be put on this statute by the plaintiff's counsel cannot prevail. In that case *Fenn* owed nothing to *Cox* previous to the bankruptcy: So here *Lewis* and *Potter* owed *Hodson* nothing previous to their bankruptcy;—but *Fenn* had been intrusted by *Cox* with that, upon which he probably would become his debtor, namely, the sale of the jewels, in which *Cox* was interested one-third part; so *Lewis* and *Potter* had been intrusted by *Hodson* with that upon which they probably would become his debtors, *£s.* with his acceptance for 442 *l.*, he having effects to the amount of 42 *l.* only;—There, *Fenn*, upon the credit of the jewels intrusted to him, trusted *Cox* on another account; so here, *Lewis* and *Potter*, on the credit of the acceptance intrusted to them, trusted *Hodson* on another account, namely, for the goods in question;—There, after the bankruptcy of *Cox*, *Fenn* received a sum of money upon the sale of the jewels intrusted to him, which became due to *Cox*'s estate; so here, after the bankruptcy, *Hodson* paid a sum of money upon the acceptance intrusted to them, for which he has a claim upon their estate. In that case the Court allowed the set-off; and yet at the time of *Cox*'s bankruptcy no balance could have been struck between the parties, because the defendant's claim arose from the produce of the pearls afterwards. What that produce would be could not be known at the time of the bankruptcy, and consequently could not then form an item in an account between the parties. Secondly, The finding of the jury, as to the undue preference, is either nugatory as to the plaintiffs, or it operates as a ground of non-suit. The plaintiffs have an option either to affirm or disaffirm the contract: if the former, the defendant is entitled to set off his demand; if the latter, though the plaintiffs might recover in trover, they cannot maintain this action. The jury found that there was a fraud in the sale: the plaintiffs cannot therefore contend that the fraud is confined to the use made of the sale. If the defendant had obtained his defence by fraud, it would not have availed: but it does not follow that, because there was a fraud in the sale of the goods, from the bankrupt to the defendant, the latter shall not set-off a cross demand against the price of the goods. The fraud (if any) was in the sale of the goods; and the effect, which it has, is this (a), that the bankrupt conveyed no property in the goods to the defendant, and that it was a naked delivery; if so, the plaintiffs should bring trover, not assumpsit.

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Russell in reply. With respect to the case of *French v. Fenn*, which seems to have been principally relied on by the other side, there are two very material distinctions between that and the present case: there did exist mutual debts between the parties in that case, though the precise amount was not actually ascertained at the time of the bankruptcy; but still it was capable of being reduced to a certainty at any time by the sale of the jewels. And if *Fenn* had become a bankrupt instead of *Cox*, it cannot be denied but that *Cox* might have come in under *Fenn's* commission for a third of the value of those jewels. Again, in that case the jewels were in the hands of the party between whom and the bankrupt the account was to be settled and the mutual debts and credits allowed: whereas here the acceptance was in the hands of third persons at the time of the bankruptcy, without any certainty that they would ever be discharged by the defendant.

Cur. adv. vult.

Lord KENYON, Ch. J. now delivered the opinion of the Court. His Lordship, after stating the facts, said, we have considered this case, and are of opinion that the defendant has made a sufficient defence against the action in its present form, and consequently that a judgment of *non-suit* must be entered. It is expressly stated in the case that the goods in question were delivered by the bankrupts to the defendant with a view to defraud the rest of their creditors; and therefore an action might have been framed to disaffirm the contract, which was thus tainted with fraud; for if the assignees had brought an action of trover, they might have recovered the value of the goods. The statute 5 Geo. 2. c. 30. s. 28. enacts that where it shall appear to the commissioners that there hath been *mutual credit* between the bankrupt and any other person, or mutual debts between the bankrupt and any other person, before the bankruptcy, the commissioners or the assignees shall state the account between them, and one debt may be set against another; and the balance only of such accounts shall be claimed and paid on either side; in the most extensive words. And therefore we are perfectly satisfied with the cases *ex parte Deere* (a), and *French v. Fenn*. But if an action of trover had been brought, instead of assumpsit, this case would have differed materially from those two; because in both those cases the goods had got into the hands of the respective parties prior to the bankruptcy, and without any view of defrauding the rest of the creditors; and therefore, according to the justice of those

cases, whether trover or assumpsit had been brought, the whole account ought to have been settled in the way in which it was, because the situation of the parties was not altered with a view to the bankruptcy: but here it was; and if trover had been brought, the defendant would have had no defence, and those cases would not have availed him. But this is an action on the contract for the goods sold by the bankrupt. And although the assignees may either affirm or dis-affirm the contract of the bankrupt, yet if they do affirm it, they must act consistently throughout; they cannot, as has often been observed in cases of this kind, blow hot and cold; and as the assignees in this case treated this transaction as a contract of sale, it must be pursued through all its consequences, one of which is that the party buying may set up the same defence to an action brought by the assignees, which he might have used against the bankrupt himself; and consequently may set-off another debt which was owing from the bankrupt to him. This doctrine is fully recognized in *Hitchin v. Campbell* (a), and in *King v. Leith* (b). Now here the assignees, by bringing this action on the contract, recognized the act of the bankrupt, and must be bound by the transaction in the same manner as the bankrupt himself would have been; and if he had brought the action, the whole account must have been settled, and the defendant would have had a right to set-off the amount of the bill. Therefore, on the distinction between the actions of trover and assumpsit, we are all of opinion that a judgment of non-suit must be entered.

Judgment of non-suit.

(a) 2 Bl. Rep. 827.

(b) *Ante* 2 vol. 141.

The KING *against* BERRY.

THE defendant was indicted for saying *of* a justice of the peace in the execution of his office, that "*he* was a broken down justice, a perjured justice, &c." At the trial before Lord *Kenyon* at the *Westminster* Sittings, Mr. *Triquet*, the justice, swore that the defendant said "*you* are a broken-down justice, &c, &c,"; speaking *to* him, and not *of* him. *Erskine* for the defendant objected that the words laid were not proved: but Lord *Kenyon* thought it was sufficient to prove the *substance* of them, and the defendant was found guilty; but the point was reserved that a judgment of acquittal should be entered, in case the Court should be of a different opinion.

Proof of words spoken *to* a person will not support an indictment charging that the defendant spoke them *of* such person.

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Erskine now moved accordingly; and

BULLER, J. said that, though there was a case in *Strange* in support of his Lordship's opinion, it had been since (a) overruled, in Lord *Mansfield's* time; and that he himself had known a variety of non-suits on the same objection.

Mingay, for the prosecutor, on being appealed to by the Court, admitted that he had known the same point frequently ruled at the Sittings.

Judgment for the defendant.

(a) *Vid. Avarillo v. Rogers, Bull. N. P. 5.*

Saturday,
Feb. 12th.

The KING against The Inhabitants of EDGEWORTH.

If a sessions case be sent down to be re-stated, and the prosecutor abandon it when it is returned, this Court will discharge his recognizance for the costs, but if he dispute the *amende order*, they will not.

WHEN this settlement case was argued in *Hilary* Term, 29 *Geo. 3.*, the Court, not being satisfied as to one fact, sent it down to the sessions to be restated. The sessions accordingly stated that fact, and returned the case here, when the order of sessions was confirmed. And though it is stated, *ante 3 vol. 354*, that it was confirmed *without argument*, we meant only *without bearing any argument*; for the counsel on both sides were instructed and prepared to argue it: but the Court thought that the additional fact stated by the sessions was decisive.

A motion was made in this term on the part of the parish of *Edgeworth* to discharge their recognizance (a) to pay costs, on the ground that their objection to the order of sessions, as it was originally stated, was well founded; and that consequently the other parish (*Casleton*) would not have been entitled to the costs, if the Court had given judgment on that case. And the cases of *R. v. Hitching* (b), and *R. v. Bray* (c), where the same rule had been granted, were relied on.

But *The Court* said that in those cases the parties suing out the *certiorari* were not held liable for the costs, because when the errors were corrected they abandoned the prosecution. But that in the present case the parish of *Edgeworth* had not abandoned the pursuit, after the case was restated, but had taken the chance of the judgment of the Court being given in their favor, when it came here a second time; and therefore they ought to pay the costs.

S. Heywood in support of the rule. *Topping, contra.*

Rule discharged.

(a) Given under 5 *Geo. 2. c. 19. s. 2.*

(b) *Burr. S. C. 504.*

(c) *Ib. 687.*

The END of HILARY TERM.

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ARGUED and DETERMINED

IN THE

Court of KING'S BENCH,

IN

Easter Term,

In the Thirty-first Year of the Reign of GEORGE III.

The KING *against* The Inhabitants of KINGSWINFORD.

Thursday,
May 12th.

ON an appeal against an order of removal of *J. Lockwood* from *Kingswinford* to *Birmingham*, the Sessions quashed the order, and stated the following case.

Service under a hiring for seven years to work only 13 hours in the day (and Sundays excepted) will not give a settlement.

The pauper, being settled at *Wakefield*, in *October* 1775 entered into an agreement with *W. Bullock*, by which he covenanted to work with and serve *Bullock* as an artificer in the art of a glass grinder, or in any other art that *Bullock* should think proper to employ him in, for 7 years; that he would not at any time during the term work for or serve any other person; and would not at any time during the term depart from or leave the work and service aforesaid, without the leave or license of *Bullock* his executors &c, but would continue and be in such service as aforesaid from 6 o'clock in the morning till 7 in the evening of each day during the said term, including half an hour at breakfast and one hour at dinner times, (except on Sundays,) if in proper health. *Bullock* agreed to provide shop-room for *Lockwood*; to pay him 3s. and 6d. per week during the term, and to provide meat &c. The pauper served *Bullock* two years at *Birmingham* under this agreement, and lodged and boarded at *Bullock's*. He occasionally worked in the night time, and often went on errands for his master on *Sundays*, and never worked with any body else during that time, nor thought himself at liberty so to do.

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Leycester moved for a rule to shew cause why the order of Sessions should not be quashed; attempting to distinguish this case from that of *R. v. Macclesfield* (a), by observing that in that case the Court decided that there was an exception in the contract of hiring, as "the service was to be only thirteen hours in the six working days, and all the rest of the time as well as on *Sundays* the pauper was at his own liberty and his own master"; whereas here it did not form a part of the contract that the pauper should be his own master after seven o'clock in the evening, and on *Sundays*: but on the contrary he expressly stipulated not to work for any other person during the whole term; and it is stated in the case that he actually did work for his master occasionally in the night-time and on *Sundays*. But

The Court refused to grant a rule to shew cause, thinking that it could not be supported. And

Lord KENYON, Ch. J. said that there was no real distinction between this case and that of *R. v. Macclesfield*; for that the fair construction of this agreement was that the pauper was to be his own master on *Sundays*, and on other days after he had served the thirteen hours, because he had only covenanted to serve those hours; and that the expression of one was the exclusion of the other. And he added that it was essential in these cases that the servant should be under the power and coercion of the master during the whole time.

Rule refused.

(a) *Burr. S. C.* 458.

Thursday,
May 12th.

The KING against FRANCIS RHODES.

A commit-
ment on
17 G. 2. c. 5.
must be a
commitment
in execution,
and is there-
fore bad un-
less it be pre-
ceded by a
conviction.

THE defendant being brought up by *habeas corpus*, it appeared that he had been committed to the house of correction in *Middlesex* under the following warrant;

"Receive into your custody the body of *Francis Rhodes* herewith sent you, brought before me *J. Spiller*, esq; one of his majesty's justices of the peace &c, by *J. Armstrong*, constable, and charged before me the said justice upon the oath of *Mary Green* for being a rogue and vagabond within the intent and meaning of an act entitled &c, [17 Geo. 2.] for that the said *Francis Rhodes* on the 25th of *March* last at &c, did unlawfully use a certain subtle craft to deceive and impose upon the said *Mary Green*, by pretending to tell the fortune of the said *Mary Green* and her husband

husband *James Green*, and did then and there foretell events which should happen to and concern her husband *James Green*; contrary to the statute &c; him the said *Francis Rhodes* therefore safely keep in your custody until the next general sessions of the peace to be holden for the said county, then and there to be further dealt with according to law; and for so doing &c."

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Erskine, and *Garrow*, moved to discharge the defendant out of custody; contending that the warrant of commitment which purported to be a conviction was void, inasmuch as he was only charged with, but not convicted of, the offence of which he was accused. And though it was held in *R. v. Brooke* (a) that a justice of peace might under this act commit a vagrant in execution in the first instance, yet such conviction must appear upon the face of it to have been duly and legally made, and should state that the magistrate after hearing the charge and the defence did *adjudge* the party to be guilty of the offence. The commitment is also bad on another ground, for not having pursued the words of the statute, in committing the defendant till the next sessions, or until discharged by due course of law, which the act has provided may be done by two magistrates, of whom the committing magistrate shall be one. In *R. v. Hall* (b) the defendant was discharged because he was only committed, under this act, until he should be discharged according to law; and it is an equally good objection to this commitment that it omits the latter branch of the clause, as it was to the other because the prior was omitted. But, Secondly, If this were only to be considered as a commitment for safe custody in order that the party should be tried at the next sessions, he is entitled to be bailed under the *habeas corpus* act.

Bearcroft, and the *Common Serjeant*, *contra*, admitted that this could not be supported as a commitment in execution, because the party was not convicted; but contended that under the statute there was an option in the magistrate either to form his own judgment upon the case, and convict the party charged, or to commit him for safe custody to the next sessions, that they might inquire into the merits, and that this was a commitment of the latter sort; consequently that in no event could the defendant be discharged without giving bail for his appearance at the sessions. But they also suggested whether the statute had not incidentally taken away the power of bailing the party; for the 32d section directs the magistrate to commit him to the house of correction there to be kept to hard labour till the next sessions &c;

(a) *Ante*, 2 vol. 190.(b) 3 *Burr.* 1636.

which

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which words are equivalent to saying "without bail or mainprize;" and it also enables the sessions to *continue* him in custody for such time as they shall see fit, not exceeding three months.

LORD KENYON, Ch. J. After observing on the incorrect manner of penning this statute, said, it having been admitted, and very properly too, that a conviction must precede a commitment in execution, I think this commitment is absolutely void, and that the party cannot be called upon to give bail. Although the act does not say in express terms that the party accused must be convicted previous to his commitment, yet, considering the whole statute together, that must be the construction of it. The judgment of the magistrate is a partial punishment. The commitment by him is in execution of his sentence, and not by way of safe custody for a future trial. If the party accused be committed for a limited time to expire before the sessions, they of course can exercise no judgment upon it; if the commitment be till the next sessions, they may, if they see fit, adjudge a further imprisonment. But in neither case is it a commitment for trial. This therefore being a commitment in execution, there ought to have been a previous conviction; for want of which the party is entitled to be discharged.

ASHHURST, J. This act of parliament is so inaccurately drawn that it is extremely difficult to understand it. But on considering the whole together, it strikes me that the magistrate may either convict the party accused, or commit him to prison till the next sessions for trial. If this were merely a commitment for safe custody, I should have thought the commitment good for that purpose, and consequently that the party must have given bail: but if it be considered as a commitment in execution, it cannot be supported without an adjudication. Now it appears to me from the language of this commitment that the magistrate meant this to be a commitment in execution; for it says "safely keep him in your custody until the next general sessions &c, then and there to be further dealt with according to law." Therefore the justice intended that the defendant should at all events be kept in prison till the next Sessions, and then that he should suffer such further imprisonment as the sessions should adjudge. This then, being a commitment in execution, is bad for want of an adjudication that the party is guilty of the crime with which he is charged.

BULLER, J. In the cases of *R. v. Brooke*, and *R. v. Aldred*, the Court determined that a commitment under this act of parliament is in execution; and I continue to hold that opinion.

This

This seems clear from the option given to the committing magistrate as to the punishment to be inflicted; he is either to order the party to be whipped, or to commit him till the next sessions, or for a shorter period: Now in two of those instances it is properly admitted that there must be a conviction of the offence to warrant the sentence; and there seems to be no reason why it should not also extend to the third instance, the Legislature not having made any distinction between them. And, as there might exist cases in which an imprisonment beyond the next sessions is necessary, power is given to the magistrate to commit the offender till the next sessions, who may encrease the punishment if they think proper. This being the true construction of the act, the only question is, whether this warrant on the face of it be a good commitment in execution; and that it is not cannot be doubted; first, because the party was not previously convicted; and secondly, because he is only committed till the next sessions, without adding "or until discharged by due course of law."

GROSE, J. I still entertain the opinion I formerly gave in the cases cited. The Legislature meant to give the magistrate jurisdiction to hear and determine the complaint, and to punish the offender; though if imprisonment be part of the punishment, there is a limitation annexed to it, and the justice can only imprison the party till the next sessions, who may order a further imprisonment if they think it right. But a commitment under this act is not for safe custody only, but in execution, and after a conviction of the offence. Therefore this warrant of commitment is bad, because it only states that the party had been *charged with*, not that he had been *convicted* of, the offence imputed to him.

Defendant discharged out of custody.

The KING *against* G. SYMMONS.

Monday,
May 16th.

A Rule having been obtained in the last Term to shew cause why an information in nature of a *quo warranto* should not be exhibited against the defendant, calling on him to shew his title to be mayor of *Axbridge* from *Michaelmas* 1789 to *Michaelmas* 1790, on the affidavits of four persons,

Erskine, and *Wigley*, now shewed cause; and, before they went into a discussion of the merits, raised a preliminary objection, that the Court ought not to attend to the application of these persons,

may be granted on the affidavit of that one if he avow himself to be the relator.

An application for a *quo warranto* information made on the affidavits of several persons, of whom all but one have consented to the election proposed to be impeached,

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inasmuch as two of them were present at, and concurred in, the defendant's election, and another of them voted at the election of mayor the succeeding year, when the mode of election was precisely similar to that at which the defendant was chosen. And it was urged that as this was a joint application by the four, who appeared to be acting in concert together, *Acton*, the fourth person, was not to be distinguished from the others; and then the rule, that the Court will not permit those persons who have acquiesced in an election to impeach it, ought to prevail in this instance.

Gibbs, in support of the rule, admitted that the rule should be applied to this case as far as it respected three of the persons, but contended that *Acton*, whose affidavit disclosed the whole ground on which the defendant's title was impeached, ought not to be affected by any acts of those three persons, merely because their affidavits were filed in making the rule. That it would be highly inconvenient in many instances if it were so; because, where a relator found it necessary to apply to a town-clerk or some officer of a corporation to make an affidavit as to the constitution of the place, his application would be dismissed, if such officer happened to have acquiesced in the election which was to be attacked. That it did not follow that a person was a relator, merely because he was joined with the relator in making an affidavit; for if it did, every such person would be liable to the costs, in case the rule were discharged with costs. But that in such cases the Court discriminated between those who were and those who were not the relators. And that, as counsel for the rule, he had a right to avow that *Acton* was the relator, and that he would be responsible for the costs.

The Court over-ruled the objection; as it did not appear that *Acton* had concurred either in the defendant's, or in any other, election of the same kind.—And, after hearing the merits, the

Rule was made absolute.

Tuesday,
May 17th.

EVANS, *qui tam*, against STEVENS.

Where the moiety of a penalty is given by a statute to the treasurer of a county riding or division,

the word *division* does not apply to small districts such as the Cinque Ports of *Seaford*, in *Sussex*, but must be construed with reference to county and riding, and means something analogous to them.

THIS action was brought by the plaintiff, who sued as well for the treasurer of the division of the town and port of *Seaford* in *Sussex* as for himself, to recover a penalty under the 22 Geo. 3. c. 41. for having voted at the last *Seaford* election, be-

ing

ing disqualified as an excise-officer: And the declaration was filed in last *Michaelmas* Term. The defendant, after a general imparlance to *Hilary* Term, pleaded in abatement "that the said division of the town and port of *Seaford* is not such a division of the said county of *Sussex*, whereof or for which a treasurer is or can lawfully be appointed;" praying that the bill may be quashed. The plaintiff in his replication, after setting forth that *Seaford* is a town corporate, and has by letters patent of *Charles* the Second an exclusive jurisdiction, pleaded that *Seaford* did not before the making of the statute 12 *Geo.* 2. c. 29. entitled "An Act for the more easy assessing, collecting, and levying, of county-rates," contribute or pay to the several rates made for the county of *Sussex*, nor at any time since has contributed or paid to the same. To this there was a general demurrer, and joinder in demurrer.

Partington, in support of the demurrer, insisted that, on the construction of the 22 *Geo.* 3. c. 41, the action should have been brought in the name of the treasurer of the county at large, instead of the treasurer of this limited and exclusive jurisdiction; for the statute directs a moiety of the penalty to be paid into the hands of the treasurer of the county, riding, or division, if in *England*, or to the clerk of the justices of the county or stewardry in *Scotland*. "Division" means a division of the county, of which there are several instances. And it is manifest from another part of this statute that the Legislature meant by *division* in this place something more than a small district like *Seaford*; for in a prior part of the clause, they used the words "county, stewardry, city, borough, or Cinque Port;" but in this place only "county, riding, or division." There is also a legislative recognition of this construction of the word "division" in another act of parliament, 8 & 9 *W.* 3. c. 30. s. 6. which gives an appeal against orders of removal to the next sessions of the peace for the county, division, and riding; for that makes an express exception of the liberty of *St. Albans*. And the construction of this statute has always been that the appeal must be to the sessions for the county or general divisions of that county, and not for any exclusive jurisdiction within that county. Where the Legislature intended to give an appeal to the sessions held for a smaller district, which they did in the 17 *Geo.* 2. c. 38. s. 4. against poor-rates, they used the words "county, riding, division, corporation, or franchise." But in this statute the words "corporation or franchise" are omitted; from whence it is fair to infer that the Legislature meant only

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the county divisions. Policy also requires that "division" in this act of parliament should receive that construction; because the justices at the sessions for such county, riding, or division, are to have the distribution of the forfeitures; and there is a greater probability that that distribution will be best made by the justices of the county, who are not connected with the local prejudices and animosities of the small district where the offence is committed, than by the justices of such district, who enter into all the election disputes, and may be interested in distributing the penalties.

Palmer, contra. The defendant's counsel has confined himself to one head of argument; but he is not entitled to the judgment of the Court, unless he can also prevail on another head, and shew that *Seaford* cannot appoint a treasurer. Now it clearly appears from the 12 Geo. 2. c. 29. that it may. That act enables justices to make county rates "within the respective limits of their commissions," which means "the limits of their respective authorities." Power is thereby given to county and corporate justices to grant warrants of distress. And the sixth section enacts that the money shall be paid into the hands of such person, being resident in any such county, riding, division, city, liberty, or place, where the rates are made, as the justices shall appoint to be treasurer. The same expression occurs in the eighth section; which also directs the vouchers to be deposited in the hands of the clerk of the peace for the county, or with the town-clerk &c, of any city, town-corporate, or liberty. If then *Seaford* can appoint a treasurer, the plea in abatement is falsified, and the plaintiff is intitled to recover. But the ground on which the defendant's argument rests cannot be supported; for the Legislature intended to give the penalty to that community in which the offence was committed. There are several statutes in which the word "division" means a small district, having exclusive jurisdiction, and is not confined to the larger divisions of the county; one of which is the act regulating the licensing of ale-houses. In the statute cited, 8. & 9 W. 3. it was absolutely necessary to put a different construction on "division;" for there it was introduced between "county and riding;" there the rule *nosctur à sociis* applied, and division excluded all districts smaller than county divisions.

Partington in reply was stopped by the Court.

Lord KENYON, Ch. J. It is not on account of the strength of the defendant's plea that our judgment will be given in his favor,

favor, but on account of the weakness of the plaintiff's declaration; for the plea cannot be supported, inasmuch as it is a plea in abatement after a general imparlance.

This action is brought on the statute 22 Geo. 3. c. 41. §. 1., which, after creating the forfeiture, directs that one moiety of the penalty shall be paid into the hands of the treasurer of the county, riding, or division, within which the offence is committed. Now the rule, *noscitur à sociis*, may fairly be retorted on the plaintiff's counsel; for the word "division" in this act stands with *county* and *riding*, and therefore must mean something analogous to them. And the word *division* applies to the county of *Lincoln*, in the same manner that *riding* does to the county of *York*. This interpretation of the word is further proved by the distribution of the penalties in *Scotland*, one moiety of which the act directs shall be applied to such purposes as the justices at the sessions for the county, stewartry, riding, or division, shall think fit; stewartry in that country being equivalent to county. And if the Legislature had intended that the penalties should be paid to the treasurers of smaller districts than counties, ridings, or divisions, they would have inserted in that part of the act the same words which are used in a preceding part, county, stewartry, *city*, *borough*, or *cinque port*.

ASHHURST, J. was not in court when this case was argued.

BULLER, J. The plea in abatement is bad on several grounds; it has no one property essential to the constitution of such a plea. In the first place, the objection mentioned by my Lord is decisive, that it is after a general imparlance. In the next place, the substance of it is bad; because it does not give the plaintiff a better writ, but tends to shew that he can maintain no action. In *Frederick v. Lookup*, in error (a), which was a *qui tam* action on the gaming act, 9 Ann. c. 14. §. 2. brought by the defendant in error who sued for himself as well as for the poor of the parish of *St. Paul Covent Garden*, one objection was that it did not appear that the offence was committed in that parish; for if it were not, it was admitted to be a clear objection either in arrest of judgment or on a writ of error. Then if this plea be bad, the next question is whether the declaration can be supported; and I am clearly of opinion that it cannot for the reasons given by the Chief Justice. Where the word "division" has a certain known sense, with reference to the same matter as *county*, it must receive that construction.

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(a) 4 Burr. 2018.

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GROSE, J. of the same opinion.

Palmer then applied for leave to amend: but

BULLER, J. said there was no instance in which the Court had given leave to amend *as to the parties to the suit in a qui tam* action after a demurrer. And

The Court said that as it appeared on the record that the plaintiff could not maintain his action, they must give judgment for the defendant, though his plea were bad.

Judgment for the defendant.

Tuesday,
May 17th.

HOLLAND *qui tam* against BOTHMAR.

An affidavit to hold to bail for penalties forfeited by unlawful insurances may include several offences, and need not state that the defendant received any consideration for making the insurances.

LANE on a former day obtained a rule to shew cause why the defendant should not be discharged out of custody, on a defect in the affidavit on which he had been held to bail. This was an action on the lottery act, 22 Geo. 3. c. 47, to recover several penalties for insuring several tickets to different persons; and the affidavit alleged that the defendant had promised and agreed to pay to those several persons divers sums of money on certain events and contingencies relating or applicable to the drawing of certain tickets or numbers &c; without adding that *the defendant had taken and received any money in consideration of such promises*; which, it was said, was fatal, and so far differed from the case of *Watson v. Shaw* (a).

Baldwin now shewed cause; and observed that by the words of the statute (b) the defendant incurred the penalties by insuring, even though he received no premium; for it says "Or under any pretence &c, promise or agree to pay any sum &c, *whether with or without consideration*, on any event or contingency relative or applicable to the drawing of any such ticket."

Lane, in support of the rule, suggested a doubt whether the words "with or without consideration" extended to this case; and argued that as the defendant's promise without having received any consideration was *nudum pactum*, and if the subject of the contract had even been a legal one could not have been enforced by either party, the Legislature could never intend to subject to the penalties of the act a party who had in fact received no benefit, and who could not compel the performance of the agreement. But even if this were within the act, he doubted whether another ob-

(a) *Ante*, 2 vol. 654.

(b) Sect. 13.

jection did not present itself on the face of the affidavit; as it included separate offences by infuring with several persons. But

The Court thought that there was no foundation for either of the objections. That the first was answered by the positive words of the statute. And that, as to the latter, several penalties for offences of a similar nature may be recovered in one action, as in the instance of bribery, where the defendant is frequently charged in the same declaration with bribing different persons.

Rule discharged.

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ATKINSON, Administratrix, *against* BAKER.

Friday,
May 20th.

THIS was an action of detinue to recover certain indentures of bargain and sale and release, and a certain memorandum in writing. The declaration alleged that *T. Foster*, being seised for his own life of a certain freehold estate, conveyed it by lease and release to *H. Williams* his heirs and assigns. That *Williams* by a memorandum in writing, and signed by him according to the form of the statute, acknowledged the consideration money in the above conveyance to be the proper money of *W. Atkinson*, the plaintiff's intestate, and that the name of *Williams* was made use of in the conveyance in trust for *W. Atkinson*, his heirs, executors, administrators, and assigns. That *Williams* delivered the deeds and the memorandum to *W. Atkinson*, who thereby became possessed of them, and who afterwards died intestate; on which administration was granted to the plaintiff, who thereby became lawfully possessed of the deeds &c, and, being so possessed, afterwards lost them; and that they came into the possession of the defendant, who is the heir at law of *W. Atkinson*, and who still detains them. To this declaration there was a general demurrer, and joinder.

If an estate
pour auter vie
be limited to
a man, his
heirs, execu-
tors, admini-
strators, and
assigns, and
be not devis-
ed, it descends
to the heir as
a special oc-
cupant.

See Atkin
2. Vern. 320.

Johnson, in support of the demurrer, insisted that the plaintiff was not entitled to the deeds, the defendant being a special occupant of the estate. Prior to the statute 29 Car. 2. c. 3. Every estate *pour auter vie*, of which there was no special occupant marked out by the grant, belonged to the person, who first took possession of it. But this being found inconvenient, that statute was passed to remedy it; and it (a) enables the proprietor to devise it, and enacts that if no devise be made, it shall be chargeable in the hands of the heir, if it come to him by reason

(a) Stat. 12.

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against
BAKER.

of a special occupancy, as assets by descent, as in case of lands in fee-simple; and in case there be no special occupant, it shall go to the executors or administrators, and be assets in their hands." As doubts arose to whom the surplus of such estates should go after paying the intestate's debts, when they were not devised, the 14 Geo. 2. c. 20. §. 9. enacted that such estates *pour autre vie* in case there be no special occupant thereof, of which no devise has been made by virtue of the 29 Car. 2, should be distributed as personalty. Now those statutes only apply to the cases of a vacant possession; but here there was a special occupant, namely the heir of *W. Atkinson*. If it be contended that the administratrix of *W. Atkinson* may take this as a special occupant, and 2 Vern. 719; 3 Atk. 466; and Carth. 376; be cited; it may be answered that the plaintiff as the administratrix might have taken if it had not been limited to *Atkinson's heirs*. But it never has been held in a case where a freehold is limited to a man, his heirs, executors, and administrators, that the latter can take to the exclusion of the heirs.

Gardiner, contra, contended that the defendant was not entitled to retain these deeds; 1st, because he claims only under the declaration of trust, of which this Court will not take notice; *Doe d. Gibbons v. Pott (a)*, it not being the case of a clear trust; or, 2dly, because the estate vested in the administratrix, in favor of the creditors at large, and not in the heir at law, the limitation to the administrators being repugnant to that to the heirs. That though the heir at law is entitled to favor in preference to a devisee, yet he is not favoured under the statute of frauds; 2 Atk. 151. And that if this estate vested in the heir, it would only be liable to specialty debts, whereas if the administratrix were entitled, she would hold it for all the creditors of the intestate.

Lord KENYON, Ch. J. The law on this subject has been truly stated by the defendant's counsel. If an estate *pour autre vie* be limited to a man, his heirs, and assigns, and it be not devised, it goes to the heir under the statute of frauds, and is liable to the same debts as a fee-simple is. Where it is granted to a person, his executors, administrators, and assigns, the executors take it subject to the same debts as personalty of any other description is; and by the 14 Geo. 2. it is distributable. Now in this case, before the plaintiff can recover the deeds in question, she must shew a title to the estate in respect of which she claims the deeds: but she objects to the defendant's retaining them, be-

(a) Dougl. 695.

cause his title, if any, is only equitable, and cannot be enquired into in a court of law. Now this court either has or has not a right to enquire in whom the equitable title is vested; and in either way of considering the question, there must be judgment against the plaintiff. If it be so doubtful a point that we cannot decide it in a court of law, the plaintiff must seek redress in equity, because the right to these documents must follow the title to the estate. And if we can examine into the title, the defendant, who is the heir at law of the tenant *pour autre vie*, must have judgment. The estate in question was conveyed to *Williams*, his heirs, and assigns; and it appears by the deed of trust, which, as being a declaration in writing, is valid by the statute of frauds, that *Williams* held the estate in trust for *Atkinson*, his heirs, executors, administrators, and assigns. The first limitation is to the heirs, and in the ordinary course of this species of property it goes to the heir at law, because it is a real estate. Then it is urged that we ought to exclude the heir, in order to let in a more numerous class of creditors. But, however convenient it might be if such were the law, when we are deciding according to law, we must take care not to infringe one of its first rules. And here the heir at law is entitled to the estate as a special occupant, and has consequently a right to detain the possession of those documents which belong to the estate.

Per Curiam,

Judgment for the defendant.

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ATKINSON
against
BAKER.

PEARCE and Another *against* TAYLOR.

Friday,
May, 20th.

UPON an application for the discharge of an insolvent debtor out of custody under the lords' act (a), it appeared that he had been charged in execution on the 16th October 1789; that in *Michaelmas* Term following, he had given the proper notice to the plaintiffs required by the abovementioned act preparatory to his discharge; but having employed an agent to pursue the subsequent steps necessary to entitle himself to take advantage of the act, which the agent had failed to do, he had been in consequence remanded. In *Michaelmas* Term 1790 he made a similar application to the Court, by virtue of the 26 Geo. 3. c. 44, which extends the provisions of the former

A prisoner, who has lost the benefit of the lords' act (32 Geo. 2. c. 28.) by the misconduct of an agent, may afterwards be discharged under the 26 Geo. 3. c. 44. s. 5. which provides relief for those who have neglected to take

advantage of the former act through ignorance or mistake.

(a) 32 Geo. 2. c. 28.

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statute;

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against
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statute; and having then complied with the requisitions of the act, the only question (a) was, whether under the 5th section of the 26 Geo. 3. the prisoner could make oath that he had neglected to take advantage of the former statute *from ignorance or mistake*. That section enacts "that where any debtor as aforesaid shall have neglected to take the benefit of the said act within the time limited by the said act, and shall have remained in prison by the space of one year (b), and shall make it appear to the court out of which such execution issued that such neglect arose *from ignorance or mistake*, such debtor shall then be entitled to take the benefit of the said act, as if he had taken the same within the time by the said act so limited as aforesaid."

Baldwin, for the plaintiffs, contended that the prisoner could not take the necessary oath, because it manifestly appeared that he had not neglected to get discharged from his *own* ignorance or mistake, but through the misconduct of the agent whom he employed. And if the ignorance or misconduct of third persons were sufficient to enable the prisoner to take the benefit of the act, it would be opening a great door to fraud.

Garrow, for the prisoner, said that the construction contended for would restrain both the words and meaning of the statute; for it would be confining these applications to cases where the neglect had arisen from a man's *own* ignorance or mistake; whereas a person in custody must act through the intervention of others; and therefore it is most probable that the Legislature meant to give relief in cases where the first application failed from the ignorance or mistake of the agent as well as from the prisoner's own ignorance or mistake.

LORD KENYON, Ch. J. Even if the neglect arose from the misconduct, and not merely from the ignorance or mistake, of a third person, I should think that as to the party himself it was fairly referable to the words and meaning of the act; as to him it may be called ignorance or mistake, if he fairly meant to do what the law required of him.

ASHHURST, J. The wording of the act in this manner was with a view to prevent a defendant taking advantage of any wilful neglect or misconduct of his own.

(a) Another question was at first made whether it were necessary for a prisoner in order to entitle himself to be discharged under the 26 Geo. 3. c. 44. to apply within the first term after the expiration of a year's imprisonment, which arose from a misapprehension of the fact; and therefore when that was explained the Court declined giving any opinion upon it.

(b) *Vide* note (a) *sup.*

BULLER, J. Even if the neglect were wilful on the part of the agent employed, yet if the defendant were not privy to it, but did every thing in his power to comply with the requisitions of the act, it is as to him imputable to mistake.

GROSE, J. The words "ignorance or mistake" are used in this act of parliament in contradistinction to "fraud and deceit."

Ordered that the prisoner be brought up.

The KING *against* The Master and Fellows of SAINT CATHERINE'S-HALL, CAMBRIDGE.

A Rule was granted in the last Term calling upon the defendants to shew cause why a *mandamus* should not issue, commanding them to declare the fellowship of the Rev. *Josbua Wood* vacant, and to proceed to the election of another fellow. The college was founded and endowed by Doctor *Wodelarke*, who gave certain statutes; and the foundation, which consisted of a master and fellows, was confirmed and incorporated by letters patent of the 15th of *Ed. 4th*. Mr. *Wood*, a fellow of this college, was about two years ago inducted to the vicarage of *Madingley*, in the county of *Cambridge*, situated at the distance of three miles and an half from the University; the acceptance of which living, it having the cure of souls, and being of the value of above ten marks (a) a year in the king's books, it was contended, vacated his fellowship.

In 1549 *Edward* the 6th sent down by commission several visitors to *Cambridge* to alter and reform the statutes of many of the colleges in the University, and (amongst others) of this college. And the defendants deposed that ever since that time (except for a short period in the reign of Queen *Mary* as to some part) the college has been governed by the statutes, as revised and altered by those visitors. Every fellow on his election swears that he will observe the statutes. The statutes, with the usage thereon, were set forth in the affidavits. A letter missive was also stated from *Charles 2d.* to the college in 1664, whereby his majesty granted his royal dispensation to *Bunning*, one of the fellows, to hold a living of upwards of ten marks in the king's books with his fellowship, which he did accordingly. And an-

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PEARCE
against
TAYLOR.

In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation in default of his heirs devolves upon the king to be exercised by the great seal.

On this ground the king is the visitor of *St. Catherine's-Hall, Cambridge*; and this court refused to interfere by *mandamus* to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election.

(a) The living was 50*l.* a year and upwards.

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PEARCE
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statute; and having then complied with the requisitions of the act, the only question (a) was, whether under the 5th section of the 26 Geo. 3. the prisoner could make oath that he had neglected to take advantage of the former statute *from ignorance or mistake*. That section enacts "that where any debtor as aforesaid " shall have neglected to take the benefit of the said act within " the time limited by the said act, and shall have remained in " prison by the space of one year (b), and shall make it appear to " the court out of which such execution issued that such neglect " arose *from ignorance or mistake*, such debtor shall then be en- " titled to take the benefit of the said act, as if he had taken the " same within the time by the said act so limited as aforesaid."

Baldwin, for the plaintiffs, contended that the prisoner could not take the necessary oath, because it manifestly appeared that he had not neglected to get discharged from his *own* ignorance or mistake, but through the misconduct of the agent whom he employed. And if the ignorance or misconduct of third persons were sufficient to enable the prisoner to take the benefit of the act, it would be opening a great door to fraud.

Garrow, for the prisoner, said that the construction contended for would restrain both the words and meaning of the statute; for it would be confining these applications to cases where the neglect had arisen from a man's *own* ignorance or mistake; whereas a person in custody must act through the intervention of others; and therefore it is most probable that the Legislature meant to give relief in cases where the first application failed from the ignorance or mistake of the agent as well as from the prisoner's own ignorance or mistake.

LORD KENYON, Ch. J. Even if the neglect arose from the misconduct, and not merely from the ignorance or mistake, of a third person, I should think that as to the party himself it was fairly referable to the words and meaning of the act; as to him it may be called ignorance or mistake, if he fairly meant to do what the law required of him.

ASHHURST, J. The wording of the act in this manner was with a view to prevent a defendant taking advantage of any wilful neglect or misconduct of his own.

(a) Another question was at first made whether it were necessary for a prisoner in order to entitle himself to be discharged under the 26 Geo. 3. c. 44. to apply within the first term after the expiration of a year's imprisonment, which arose from a misapprehension of the fact; and therefore when that was explained the Court declined giving any opinion upon it.

(b) *Vide* note (a) *sup.*

BULLER, J. Even if the neglect were wilful on the part of the agent employed, yet if the defendant were not privy to it, but did every thing in his power to comply with the requisitions of the act, it is as to him imputable to mistake.

GROSE, J. The words "ignorance or mistake" are used in this act of parliament in contradistinction to "fraud and deceit."

Ordered that the prisoner be brought up.

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A Rule was granted in the last Term calling upon the defendants to shew cause why a *mandamus* should not issue, commanding them to declare the fellowship of the Rev. *Josbua Wood* vacant, and to proceed to the election of another fellow. The college was founded and endowed by Doctor *Wodelarke*, who gave certain statutes; and the foundation, which consisted of a master and fellows, was confirmed and incorporated by letters patent of the 15th of *Ed. 4th.* Mr. *Wood*, a fellow of this college, was about two years ago inducted to the vicarage of *Madingley*, in the county of *Cambridge*, situated at the distance of three miles and an half from the University; the acceptance of which living, it having the cure of souls, and being of the value of above ten marks (a) a year in the king's books, it was contended, vacated his fellowship.

In 1549 *Edward* the 6th sent down by commission several visitors to *Cambridge* to alter and reform the statutes of many of the colleges in the University, and (amongst others) of this college. And the defendants deposed that ever since that time (except for a short period in the reign of *Queen Mary* as to some part) the college has been governed by the statutes, as revised and altered by those visitors. Every fellow on his election swears that he will observe the statutes. The statutes, with the usage thereon, were set forth in the affidavits. A letter missive was also stated from *Charles 2d.* to the college in 1664, whereby his majesty granted his royal dispensation to *Brunning*, one of the fellows, to hold a living of upwards of ten marks in the king's books with his fellowship, which he did accordingly. And an-

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In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation in default of his heirs devolves upon the king to be exercised by the great seal.

On this ground the king is the visitor of *St. Catherine's Hall, Cambridge*; and this court refused to interfere by *mandamus* to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election.

(a) The living was 50*l.* a year and upwards.

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other instance of the same sort in the same reign was adverted to and admitted, which latter was not stated in the affidavits.

It appeared further that no visitor had been appointed by *Wodelarke* the founder, and that his heirs were extinct.

Two questions were principally made in the argument, 1st. As to the jurisdiction of the court of King's Bench; 2dly. As to the construction of the statutes. And the usage which was stated at length in the affidavits was relied on by the defendants; in the first instance to shew that the king had in fact acted as visitor of this college, which the court would attribute to a right-full power; In the second, the usage was relied on as interpretative of the statutes. But, as the Court gave judgment on the general ground of their want of jurisdiction, the right having devolved on the king, to be exercised by his chancellor in default of heirs of the founder, and said nothing upon the point of construction; the statutes themselves and the whole of the facts and argument relating to the construction of the statutes are therefore omitted.

Erskine, Law, and Graham, shewed cause against the rule; contending, 1st. That in default of heirs of the original founder the right of visitation devolved on the king, who visited by his chancellor, or by special commissioners appointed under the great seal; and consequently that this Court ought not to take cognizance of the question. It is clear that where the king is founder of an eleemosynary lay corporation; or where the king and a private person are joint founders; or where a private person endows a royal foundation without specially appointing a particular visitor; in all these cases the king is visitor, and visits by his chancellor. 1 *Inst.* 96. *F. N. B.* 42. 2 *Inst.* 68. 2 *P. Wms.* 326. *Eden v. Foster*. The devolution on the crown does not change the nature of the institution; it still continues eleemosynary and not civil. The principle holds universally, that wherever the king has a right of visiting, by whatsoever title it accrues to him, such right must be exercised through the medium of his chancellor; and no instance can be shewn of this Court having visited *eo nomine* any foundation in right of the king. The power of visiting arises by the common, and not by the canon, law: and that power is incident to the founder and his heirs, unless he delegate it to another (a). It is personal in its nature, and is so exercised by the founder and his heirs; and

(a) Lord Holt's argument in *Phillips v. Fleet*'s argument in *Dem. Proc.* in the same case, 1 *Burn. Ec. Law*, tit. *College*.
Bury, ante 2 vol. 352; and Bishop *Stillington*

therefore if it devolve at all upon the king, it must devolve upon him, such as it was before, in his personal capacity, to be exercised accordingly in the same manner as if he had been the original founder, otherwise a different power would devolve than that which existed before. It seems necessary for the preservation of order and tranquillity in such seminaries of learning that the visitatorial power should not be extinguished in default of the founder's heirs: and therefore upon the same principle that the common law annexes such a power to his heirs without any special designation of the founder himself, upon default of his heirs the power must devolve upon the king as the general heir where none other is to be found. In *Phillips against Bury* (a), Lord *Holt* says, "a visitor is of necessity created by the law". And the provisions of the 25 *Hen. 8. c. 21. s. 20*, are in conformity to this principle; which enables the king by commission under the great seal to visit all monasteries, colleges, hospitals, priories, houses and places religious exempt. The first instance of any application to this Court in these matters was in the time of *Cromwell* (b): and that was in the case of one *Hern* referred to in Dr. *Withrington's* case, 1 *Keb. 234*. *Hern* then obtained a *mandamus* to restore him to a place in the University; but the reason given was, because there was then no special visitor; for the archbishop of *Canterbury* was local visitor, and the see was then vacant. And in the year 1655 in the case of the *Protector* against *Craford* (c), a *mandamus* to the master and fellows of *Gonville and Caius* college to restore the defendant to an usher's place of a free-school in *Cambridge*, of which as visitors they had deprived him, was denied. And an application of a similar nature was refused in Doctor *Withrington's* case (d) 13 & 14 *Car. 2*, because there was a visitor. The next was *Patrick's* case, 16 & 17 *Car. 2*. (e), where, upon an application for a *mandamus* to the senior fellow of *Queen's* college, *Cambridge*, to admit *Patrick* to be president thereof, the questions were, who should be visitor, and whether a *mandamus* lay where there was a visitor. *Norton* and *Keeling* were for granting a writ, but *Twysden* and *Wyndham*, contra, on the ground that there was a visitor. Now in that case it was agreed on both sides, as well by *Raymond* who argued for Doctor *Patrick*, as by *Finch*, Solicitor General, who was of counsel with the college, that if there were no visitor specially appointed, then in common reason

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(a) *Ante*, 2 vol. 352.(b) Referred to by *Stillington* in his argument *loc. ubi supra*.(c) *Sty.* 457.(d) 1 *Keb.* 2. 50, 61. 68. 79. 131, 150.234. 458. 1 *Lev.* 23. & *Sid.* 71. S. C.(e) *Sir T. Ray.* 101; and 1 *Lev.* 65.

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and according to the rule of law, *ne deficeret justitia*, the king was visitor. In Doctor *Bentley's* case (a) indeed a peremptory *mandamus* was awarded to restore him to his academical degrees; but that was because he had been degraded without having been heard in his own defence. And it was there admitted (b) by Mr. *Reeve*, who argued for Doctor *Bentley*, that if the University had returned that the king was their visitor, as they might have done, it would have put an end to the dispute. But the opinion of Lord *Holt* in 12 *Mod.* 232. is decisive, wherein, upon an application for a *mandamus* to a college in *Oxford*, after observing that it was a lay corporation, and that the visitation belonged then to the founder and his heirs, he says "and if he die without heirs, I take it the visitation shall go to the king; of which *Vide* 5 *Ed.* 4. (c) *Simon de Monford's* case: "and this is my private opinion." The case which perhaps will be principally relied on by the other side is *The King v. The Bishop of Chester* (d), where a *mandamus* was granted to the bishop, as warden of *Manchester College*, to admit a chaplain, upon the ground that the bishop being visitor of this college, which was of royal foundation, and having been also appointed warden, could not visit himself, and consequently the visitatorial power was suspended, and the remedy was in this Court to prevent a failure of justice. It is true indeed that the Court there held that the visitatorial power could not result back to the king: but the reason of that case was that there was a visitor in being, and therefore the power could not devolve on the king in default of a visitor; but in as much as from the particular circumstances of the case he could not exercise his functions as visitor, the general superintending power of this Court was obliged to be exercised. That case therefore differs widely from the present; for here, as the founder's heirs are extinct, the king as general representative stands in their place; and as he is capable of exercising the visitatorial power in it's full force, the necessity of this Court's interference does not now exist as it did in the case of *Manchester College*. But even there it was found necessary to guard against the inconvenience of extending the exercise of the visitatorial power by this court further than that case went; for by the 2 *Geo.* 2. c. 29. after stating that doubts had arisen whether the king could visit the said collegiate church during

(a) 2 *Ld. Ray.* 1334. 10 *Geo.* 1. 1 *Stra.*
557. S. C.
(b) 2 *Ld. Ray.* 1338.

(c) 5 *Ed.* 4. 123. *Long. Quint.*
(d) 2 *Stra.* 797.

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the suspension of the bishop of *Chester's* power, the power of visiting the same is vested in the crown: and then by the 3d section it is specially enacted, that if any dispute should arise concerning the election or admission of any of the present members of the college, by reason of their not having been elected or admitted within the time limited by the charter, the same should be determined by the course of the common law, &c. The recital in the statute throws considerable doubt upon that case. Another case, that of *Rex v. Gregory*, E. 12 Geo. 3. B. R. (a), may be mentioned for a dictum of Lord *Mansfield* to the following effect; that, where the right of visitation came to the crown in default of heirs of the founder, the king would visit by his common law courts. But it is to be observed that that was not the point in question before him, but whether an information in nature of a *quo warranto* would lie against a fellow, to shew by what authority he claimed to be such; and probably it was thrown out in argument without much consideration of the question. At all events if there be authorities on either side, and the question has never been solemnly determined, it imports the court seriously to weigh the inconveniences which are likely to result from determining that this Court can visit foundations of this sort. For if they can visit in one instance, there will be the same reason for visiting in all. And besides that in many instances which are the subject matter of visitatorial control the Court will find great difficulty in adapting its function to the cases which may arise, the very foundation of the visitatorial power, which is a general discretion, is totally repugnant to the constitution of this Court, which is governed by known and established rules of law. And all the mischiefs of litigation and vexation, against which the visitatorial power was intended to be a guard, will thereby be introduced. Independently however of the general principle of law by which the right of visitation devolves on the king in default of heirs of the founder, it appears in point of fact that the king is visitor of this college: for there was a visitation by commissioners in *Ed. 6th's* time; and the dispensatory letters sent to members of this college by *Charles 2.* are referable to the same power. For at this distance of time the Court will rather refer these acts of the crown to a rightful than to a wrongful arbitrary authority. And it may therefore be presumed that the crown was appointed visitor by the special designation of the founder by some ancient

(a) *Vide post*, 240. n. (a.)

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instrument now lost. And this argument is warranted by the case [mentioned in *Saint John's College* against *Toddington* (a)] of *Doctor Martin v. The Archbishop of Canterbury*, as visitor of *Merton College, Oxford*, *Tr. 11 & 12 Geo. 2.* It was the case of a private fellow. It was contended by *Doctor Martin* that the bishop of *Winchester* was visitor: the other side shewed that the archbishop had exercised this power, but the bishop of *Winchester* never had. And it was said that as the case was doubtful a prohibition was proper: but *per curiam* "though long usage will not give a right, yet it is strong evidence of it"; and a prohibition was denied.

Bearcroft, Le Blanc, Serj., and Yorke, contra, admitted that where the king was visitor in right of a royal foundation, or by special designation, the power was to be exercised through the medium of his chancellor, and not by this Court, and that where there was any visitor this Court would not interfere in matters of visitatorial appeal; but contended that none of the authorities cited in support of those positions affected this case, where in default of heirs of the founder there was no visitor. On the contrary it has been solemnly determined that where there is no visitor, or the visitatorial power is suspended, the remedy is by application to this Court for a *mandamus*. It is not pretended that the visitatorial power comes to the crown in default of heirs of the founder by *escheat*. The right of visitation arises from the endowment of the foundation, in order to superintend the proper application of the founder's bounty. The term *escheat* is applicable only to tenure; so long therefore as the land remains to the original purposes; the visitatorial power which arises in respect thereof cannot be said to *escheat*. In order to maintain a colour of argument for contending that this right vests personally in the king in default of the founder's heirs, the other side are driven to have recourse to the term *devolution*, which is taken from the civil law, and is a source of acquiring rights or property unknown to our laws. The argument, if it has any foundation, must go the whole length of shewing that there must of necessity be a special visitor of every institution of this nature; in which case it would necessarily follow that this Court have done wrong in every such instance where they have interfered by *mandamus*. For the same answer might have been given to every application, on the defect of visitatorial jurisdic-

(a) 1 Burr. 158. But the case adverted to is taken from a note in 1. *Burn's Ecc. Law*, tit. College.

tion, that where no other special visitor was empowered to act, the visitatorial power devolves on the king personally, to be exercised through the medium of his great seal. Such a notion of visitatorial power is entirely new, and inconsistent with its origin, which arises from the private act of the founder himself, and subject to be moulded by him in whatever manner he pleases; which could not be if it were a mere creature of law. Whereas the power of this Court to interfere in such cases as the present, where there is no visitor, or his power is suspended, has been long established, and arises from the general superintendant authority which it exercises over all corporations, where other jurisdictions are deficient, to prevent a failure of justice. And no greater difficulties are likely to arise in these than in other species of lay corporations, which are alike governed by the general law of the land and their own peculiar charters or statutes. The only ground of application can be to enforce the observance of their institutions, which this Court are just as well competent to do as any other tribunal. This as well as all other colleges is incorporated by charter, from whence the king is called *Fundator incipiens* (a), but that is by virtue of his political and not of his personal character. The visitatorial power springs from the *Fundator perficiens* or endower, and is altogether subject to his control. The only power therefore that can result to the crown is that which flowed from its political capacity; and such power must be exercised by this Court. Nor is there any instance of interference by the court of chancery where there was no visitor. And all the cases wherein that Court have interfered on the ground of the king's being visitor are where the college was of royal foundation. The case of *The King v. Bishop of Chester* (b), where the Court interfered by *mandamus*, was much stronger than the present: For that was a case of a royal foundation; and it was there contended that as the visitatorial power of the bishop was suspended, the right necessarily resulted to the crown to be exercised by the great seal: but even in that case the Court held otherwise, and determined unanimously to grant the *mandamus*, upon the broad ground that in every case where there is no visitor or the visitatorial power is suspended, which they considered as the same thing, the right of superintendence comes to the crown in its politic capacity, as the fountain of corporate rights to be exercised by this court. And that case was afterwards recog-

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(a) 1 Black. Com. 481.

(b) 2 Str. 797. and a MS. note of Lord Hardwicke.

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nized by the act of the 2 Geo. 2. c. 29. wherein it was held necessary to restore by act of parliament the ordinary visitatorial power to the king; still however providing for the exercise of the jurisdiction of this court as to all the temporal rights of the parties during the suspension of the visitor's powers. But if the visitatorial power had vested in the king as a consequence of law, there would have been no necessity for the Legislature to confer it on him: and their doing so affords a strong inference that without the aid of that statute the visitatorial power would not have devolved on the king, but must have remained in suspense. Now if that power were held not to result to the king personally on failure of the capacity to exercise it by the local visitor, even where the college was of royal foundation, still less can it devolve upon him by a new title where it is of a private foundation, for the same reason. And the authority of that case has been repeatedly recognized both in chancery and in this court. *Green v. Rutherford*, 1 Vez. 471. *Rex v. Gregory*, E. 12 Geo. 3 (a). and *Rex v. Bishop of Ely*, ante 2 vol. 339. And

(a) *Rex v. Gregory*, East. 12 Geo. 3. B. R. Upon a rule to shew cause why an information in nature of *quo warranto* should not be exhibited against the defendant, to shew by what authority he claimed to be fellow of *Trinity Hall*, in *Cambridge*, the case appeared to be, that the defendant had been elected by a majority of the fellows; but the election had been made on a different day from that which the master had appointed, who claimed a right by the statutes of the college of appointing a day for the election, and presiding thereat if he pleased.

[The particular statutes and circumstances relative to the propriety of the election, with the arguments thereon, not being material to the principal case, are omitted.]

On shewing cause against the rule,

Wallace, *Mansfield*, and *Robinson*, first objected to the mode of application, that in these cases of lay eleemosynary foundations it was intrusted to the founder and his heirs, or other special visitor, to terminate all such disputes as the present; and that they ought not to be determined by information in nature of *quo warranto*. But Dr. *Marriot*, the master of this college, grounds this application on an affidavit, that he does not hear

of any heir of the founder being alive; but supposing there is no such heir in existence, the right of determining these disputes must result to the crown by prerogative.

Again, by 9 Ann. c. 20. this court does not acquire any authority to grant these informations with regard to college offices. It is not pretended that such an information would lie if there were a visitor; and as the act does not particularly exempt colleges which have visitors from being subject to such informations, in this respect *Trinity Hall* stands in the same situation, with respect to the statute, as if it had a special visitor.—But colleges are for private education only: and a fellowship or scholarship can never be called a royal franchise, so as to be subjected to this process. They have this only connection with royal prerogative, that they may purchase and hold lands. In *Manchester College* case, 2 Stra. 797. where the court granted a *mandamus*, under an idea that the right of visitation was suspended by the bishop of *Chester*, who was the visitor, being warden of the college, and he being therefore a party interested could not visit as a judge. *Phillips v. Bury*, Skin. 447. (a); where the distinction is taken between public and private foundations. *Rex v. Marf-*
den,

(a) Since reported ante 2 vol. 346.

And what was said by Lord Mansfield in *Rex v. Gregory* is directly in point to this question, and was not merely an *obiter dictum* like the opinion of Lord Holt in 12 *Mod.*, but was one of the points for the determination of the Court. The first point which was

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den, 3 *Burr.* 1812. *Parkinson's case*, *Carth.* 92. where even a *mandamus* was denied to restore a fellow to his fellowship. But even though a *mandamus* might lie in this case, yet there are a variety of instances where the court have granted a *mandamus*, at the prayer of persons in no ways entitled to informations in nature of *quo warranto*. *Rex v. Dr. Bentley*, 2 *Stra.* 912. *Fort.* 298.

Dunning and Davenport, in support of the rule, argued upon the propriety of this mode of proceeding, by information in nature of *quo warranto*. If the supposition of there being somewhere the heir of the founder existing has any weight, as urged on the other side, it brings the present case exactly within that of *Manchester College*, where this court interposed on account of the visitatorial power being in suspense. But if there be no heir of the founder, this power must escheat; and the question will be, How must this escheat take place? If it be a subject of tenure, it must revert to the original grantor. As to *Parkinson's case*, it has, by subsequent decisions, been denied to be law; and in *Rex v. Whaley*, 2 *Stra.* 1139. a *mandamus* was granted to compel the master to admit a fellow, where there was a visitor. And the visitatorial power is in the nature of a claim of cognisance, which is not to be favoured in exclusion of the ordinary constitutional method. That this is a lay corporation is undeniable; and as such, it is subject to the temporal jurisdiction. In this court, therefore, we must seek our remedy. But it has been said that this is not the proper remedy; and it is objected, that antecedently to the statute 9 *Ann.* there existed no such practice as granting these informations at the instance of private persons; and that the 9 *Ann.* does not of itself allow of them. But in the time of *Will. 3.* these informations did issue, as in the case of *Rex v. The Corporation of Hertford*. It is certain then that this mode did exist prior to the statute of *Ann.* and that does not take it away; on the contrary, it uses the most extensive and comprehensive terms in the word *officer*; and surely the master or head of every lay corpora-

tion is the head officer of such corporation.

Ld. MANSFIELD, Ch. J.—As to the first objection to this mode of application, that this court cannot interfere, because, if there be no visitor, the power of visiting escheats to the king in chancery, as a charity, I answer, that the foundation is not a charity, and the power of superintending it does not go to the king as visitor; but it is a corporation, and as such, the right devolves to the king to be exercised here. The case of *Manchester College* is very strong to this point; for there, as long as the suspension of the visitatorial power lasted, it was the same as if there had been no visitor, and the king, in this court, proceeded upon it. The statute 2 *Geo. 2. c. 29.* is here very material; for as this court did not exercise the ordinary visitatorial power, that act made the king visitor of *Manchester College*; but if any question concerning the election and interest arose, the act fixed the decision of it in this court. This being clear as to the right of this court to interfere, how is this mode to be applied? The change of the judge does not change the test by which it must be determined, which is by the statutes of the college.

As to this mode by information, the objection to it is strong, that no such information can be filed here under the stat. 9 *Ann.* and that all other informations ought to be filed by the attorney general. But those informations did exist before the statute of *Ann.* Every college is a corporation in itself; and altogether they form one corporation in the university in gross. There is a case in *Russborough*, where it is said, that the visitor of the university at large is the archbishop of *Canterbury*. Yet if a person shew here a grievance, which wants to be remedied, this court will find a remedy. A *mandamus*, or an action brought by a fellow, appointed by the master in right of a lapse, might have answered the same purpose.

But upon the merits, I have not a shadow of doubt. [His lordship then proceeded to shew that Mr. Gregory had been duly elected.]

Rule discharged.
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there to be considered was, whether the Court had any right to interfere at all; for it was contended that as the heirs of the founder were extinct the visitatorial power resulted to the crown, and ought to be exercised by the medium of the great seal. If that were so, it was nugatory for the Court to construe the statutes of the college, and to see whether Mr. Gregory were properly elected a fellow or not. The question therefore came directly before the Court; and Lord Mansfield gave it as his decided opinion, that the visitatorial power did not escheat to the king in Chancery, in default of heirs of the founder, like the case of a charity, but that, as a corporation, the right devolved on the king to be exercised in this Court. The Court indeed were of opinion that the mode of application for an information in nature of *quo warranto* was wrong, they having no authority to receive such an information under the 9 Ann. but still they held that a *mandamus* would have been proper. However that was not applied for, because the Court upon the merits thought Mr. Gregory's election good. With respect to the argument drawn from the exercise in fact of the visitatorial power by the king, that is easily explained. It is notorious from the history of the reign of Edward 6th. (a), and from the commissions themselves, which are in 15 Rym. Foed. 178, and 183, that they were not issued upon the foot of the king's general visitatorial power in the sense now contended for; but were derived from his newly acquired spiritual jurisdiction upon the ruins of the papal authority in this kingdom. Neither was it a commission of visitation to this particular college, but to the Universities at large both of Oxford and Cambridge. Non constat that the heirs of the founder were extinct at that time; at all events the visitation did not proceed on that ground. Neither were the proceedings under those commissions of a visitatorial nature. The parties were not summoned or heard, nor was there any adjudication upon the supposed abuses which they corrected. And the same answer applies to the statute 25 H. 8. The power of visiting thereby conferred on the king was of an ecclesiastical nature, the same as had been claimed by the pope before that time as head of the church. And in those times these eleemosynary bodies were considered as ecclesiastical, though now that idea is exploded. On the other hand the letters missive of Charles 2. were pure acts of arbitrary dispensation, and certainly

(a) Vide Burnet's Hist. of the Reformation.

could not be supported at this day, though the king still takes upon him in the university of *Cambridge* to issue letters mandatory for the conferring of degrees. Neither do those letters purport to be visitatorial acts, but are expressed to flow from his *royal* dispensation, a prerogative claimed and exercised in those times in other instances than these. But at all events if the question depended upon this consideration whether the king were in *fact* visitor or not, the Court would send it down to a jury to be tried.

The Court took time to consider this question; and now

Lord KENYON, Ch. J. delivered the opinion of the Court.

Having observed the anxiety of the parties to have this question decided, we think it is better to give our opinion now, having maturely weighed all the authorities, as well those which were cited at the bar, as that referred to by Lord *Holt* in the case in 12 *Modern* (a), than to keep the parties longer in suspense. The principle on which Lord *Mansfield* proceeded in the case of *The King v. Gregory*, and which may not be brought improperly into cases of this kind, was a wish to adapt the administration of justice to the convenience of the parties, not indeed so as to control the law, but as a guide in doubtful cases and on untrodden ground. Lord *Coke* also mentions the argument *ab inconvenienti* as a powerful argument in such cases to shew what the law is. That it is extremely convenient that all disputes of this kind should be decided in *foro domestico* cannot be doubted. And if that argument were entitled to much weight in *St. John's College v. Todington*, it certainly merits the same attention in this case.

The right now claimed cannot be said to *escheat*; it is misapplying the word; for that appertains to estates held by tenure, and where on failure of heirs of the donee the estate reverts to the donor, as an escheat. But there are several kinds of property which belong to the king when there is no other person to take them; as in the instance of all goods, of which no owner is to be found. Then there is nothing incongruous to the general principles of the law to say that this power, now contended for, which at the time when the charity was founded was vested in some body, should now devolve on the king, there being no other person who has any claim to it, to be exercised *cy-pres* to the manner in which it was exercised by the founder and his heirs. This power, though not expressly reserved to the king by the founder, yet belongs to him by operation of law. The great authority against this opinion, and which weighed most

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The KING
against
The Master
and Fellows
of St. CATHERINE'S
HALL.

(a) 5 Ed. 4. 123. Long. Quint.

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against
The Master
and Fellows
of ST. CATHERINE'S
HALL.

in our minds, was what was said by Lord *Mansfield* in *R. v. Gregory*. But of that it is sufficient to say that it was not the point in judgment before the Court; his attention was not immediately called to it; and I do not believe it was an opinion by which he would wish to be bound; it being at the most an *obiter dictum*, we do not lay so much stress on it as we should otherwise have done, as it came from so high and respectable an authority. The other authority cited on the same side was the case of *Manchester college*, and the act of parliament which was passed in consequence of that determination. But I confess that that statute weighs in my mind the other way. It was contended by the counsel in support of the rule that the last clause of that act was at variance with the first, and abridged the construction of it. The first clause in that statute enacts that, when it shall happen that the wardenship of *Manchester* shall be held in commendam with the bishopric of *Chester*, the power of visiting *Manchester college* shall be vested in the crown; and it enables the king to visit it, according to the charter of foundation; that power of visitation then must be exercised by the king in his Court of Chancery. If that clause had stood alone, it would not assist the argument in support of the rule; because we must suppose that the Legislature intended in that case to follow the course of the common law as nearly as possible; and under that act the king cannot exercise his visitatorial power in this court. Then it was argued that the last clause controls the operation of the former, because it provides that disputes concerning the election of the members of the college shall be determinable by the course of the common law, as if there were no visitatorial power in being. But that clause does not say that *in future times* such shall be the law; it merely respects the case of the *then existing members*; leaving the power of visiting in other cases in the chancellor, and cautiously avoiding to stir the question relative to the propriety of granting the *mandamus*, which gave rise to the act. These two authorities, which were urged in favor of the *mandamus*, being answered to our satisfaction, the only points left for our consideration are the convenience of the case and the general law on the subject. In general, corporate bodies, which respect the public police of the country and the administration of justice, are better regulated under the superintendence of this court than of the Court of Chancery; but it is otherwise with eleemosynary foundations in general. What is said by Lord *Holt* in 12 *Mod.* seems decisive of this question: for though it is only called his private opinion, yet as it was formed by him on a subject which

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he had so thoroughly considered, and as the general convenience of the case coincides with it, it is entitled to our best consideration. Therefore with no decided authority, or general principle of law, against us, but with the convenience of the case and general principles of law in our favor, we shall do more substantial justice to the parties in this particular case, and to the public in general, by refusing to grant this writ of *mandamus*, and by referring this question to the Lord Chancellor, than by entertaining jurisdiction over it.

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*See Mr. Wharham's Case 4 Ves.
Jun. 609. & particularly what Mr.
Mansfield contended against this
case & what Lord Chancellor expressed
in favor of it. See further my opinion
in Aug. 1805. on a Cambridge
case.*

Rule discharged.

The KING against The Inhabitants of BIRDBROOKE.

Saturday, May 21st.

TWO justices removed *M. Meers*, his wife, and children, from *Stoke by Clare, Suffolk*, to *Birdbrooke, Essex*: The Sessions confirmed the order, and stated the following case.

The pauper *M. Meers*, being settled at *Birdbrooke*, was hired when he was single by *John Olley*, farmer, at *Stoke by Clare*, at three shillings per week the year round; each was to be at liberty on a fortnight's notice, but the pauper was not to go away at seed-time, hay, or harvest. He staid in that service a year at *Stoke*, and received his wages at different times whenever he pleased.

Service for a year under a hiring "at 3s. per week the year round", with liberty to go on a fortnight's notice, will give a settlement.

J. Heywood, in support of the order of Sessions, contended that the pauper gained no settlement at *Stoke by Clare*, because he only served there under a weekly hiring, *R. v. Newton Tony* (a). There is nothing to shew that this was a hiring for a year; for the expression of "the year round" is not stronger to that effect than that "of Summer and Winter", which was held in *R. v. Dedham* (b) not to be a hiring for a year. The addition of the words "the year round" to the weekly wages was merely to regulate the price of the pauper's labour at the different seasons of the year in case he consented to stay: but the proviso that he should not leave the service at particular times of the year affords a strong inference that he might have left his master at any other part of the year, without being guilty of a breach of his contract; and this is further confirmed by his being at liberty to put an end to the contract on giving a fortnight's notice.

Lord KENYON, Ch. J. (stopping *Erskine*, and *Hay*, contra,) said,—No doubt can be entertained on this case. It does not even

(a) *Ante*, 2 vol. 453.

(b) *Burr. S. C.* 653.

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rest on a general hiring, for this was an express contract to serve "the year round". But it is said that this cannot be considered to be a hiring for a year, because there was a reservation of weekly wages, and because each party was to be at liberty to put an end to the agreement on giving a fortnight's notice: but whether the wages be to be paid by the week or the year cannot make any alteration in the duration of the service, if the contract were for a year. This therefore was a contract for a year at so much a week, with liberty to quit at any time except seed, hay, or harvest time, on giving a fortnight's notice: but the power of giving notice makes no difference, for it has been held that an agreement to leave the service on giving a month's warning did not defeat the settlement (a).

ASHHURST, J. of the same opinion.

BULLER, J. The only question is whether this were a yearly or a weekly hiring; in support of the order of Sessions the latter has been contended; but a hiring for a week requiring a fortnight's notice was never heard of.

GROSE, J. absent.

Both orders quashed.

(a) *R. v. New Windsor, Burr. S. C. 19.*

Tuesday,
 May 24th.

The KING *against* Sir J. CARTER and Others.

If on an appeal against overseer's accounts the sessions disallow some of the items, and do not order the overseer to pay the balance to the successors, two justices out of Sessions may enforce payment of the balance; and if they refuse to interfere, this Court will grant a mandamus to compel them to hear the complaint.

ON an appeal against the allowance of the accounts of Mr. *Read*, an overseer of *Fareham, Southampton*, the Sessions disallowed several items in the account, amounting in the whole to 42*l.* 7*s.* 1*d.*; but the order of Sessions did not proceed to direct Mr. *Read* to pay that sum over to the succeeding overseers. On Mr. *Read*'s subsequent refusal to pay over this sum, an application was made to two of the defendants, as magistrates, desiring them to enforce payment under the 43 *El. c. 2. s. 2. & 4.* and 17 *Geo. 2. c. 38. s. 3.*; but those gentlemen, conceiving they had no authority to act, declined to interfere; whereupon a rule was obtained requiring them to shew cause why a *mandamus* should not issue, to compel them, or any two of them, to receive and proceed on the complaint against Mr. *Read*, for refusing to pay over the balance in his hands.

Burrough now shewed cause; contending that the magistrates had no jurisdiction, as this case had been before the Sessions, who

who had made a judicial order upon the subject. The 43 *El.* c. 2. *f.* 2, & 4, directs the overseers to pay over the balance in their hands to their successors in four days; and in default thereof enables two magistrates to levy the sum due by distress and sale of the offenders' goods, or to commit them to prison. The 17 *Geo.* 2. c. 38. *f.* 3. only enlarges the time of paying the balance to 14 days; giving the justices the same power to commit the defaulters to prison, and omitting the levying of the balance by distress and sale. And under both statutes an appeal to the Sessions is given against the allowance of the accounts. But the power of the magistrates is confined to cases where there is no appeal. Here the prosecutor chose to appeal to the Sessions; and therefore he should pursue that remedy by sessions process. And these magistrates, acting out of the Sessions, have no power under either of these statutes to compel the payment of the balance of this account.

Lord KENYON, Ch. J. (stopping *Portal*, who was to have supported the rule) said; It seems to me that these justices have jurisdiction in this case. The effect of the appeal was the ascertaining the *quantum* of the arrears; and then the statute attaches, and enables the magistrates out of Sessions to enforce the payment of the balance.

ASHHURST, J. and BULLER, J. absent.

GROSE, J. These are as much arrears now as they were before the appeal; only the *quantum* is ascertained.

Per Curiam,

Rule absolute.

WICKS *against* FENTHAM and Another.

Thursday,
May 26th.

THIS was an action for a malicious prosecution; at the trial of which at the *Westminster* Sittings after last term before Lord *Kenyon*, it appeared that the defendants had indicted the plaintiff, as constable, for having permitted a prisoner to escape out of his custody, upon which indictment he had been acquitted because he was a headborough and not a constable. It was objected by the defendants' counsel that this action could not be maintained, because the plaintiff had not been acquitted on the merits; and Lord *Kenyon* nonsuited the plaintiff, on the authority of a case at the *Monmouth* Summer Assizes 1768, before *Aston*, J., who thought that, in order to entitle the plaintiff to recover in an action for a malicious prosecution,

An action lies for a malicious prosecution, tho' the plaintiff be acquitted on a defect in the indictment.

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cution, it ought to appear by the opinion of the jury that on the merits there was no foundation for the original prosecution.

Erskine obtained a rule on a former day to shew cause why the nonsuit should not be set aside, and a new trial granted, on the authority of *Chambers v. Robinson* (a), where this precise point was determined as well on authority (b) as on reason; and where the Court said that "a bad indictment served all the purposes of malice, by putting the party to expence and exposing him, but that it served no purpose of justice in bringing the party to punishment, if he were guilty."

Mingay, and *Garrow*, were now to have shewn cause; but

The Court were of opinion that they were bound by the cases of *Chambers v. Robinson*, and *Jones v. Gwynn*, to make the Rule absolute.

(a) 1 Str. 691.

(b) *Jones v. Gwynn*, Gilb. 185. and 10 Mod. 148, 214.

Thursday,
May 26th.

LIDDERDALE against The Duke of MONTROSE
and Lord MULGRAVE, Paymasters General of the
Army.

The future
half-pay of
an officer is
not assign-
able.

THIS was an action on the case; wherein the declaration stated that the plaintiff before and on the 24th June 1788, and from thence until and at the time of making the promise therein after next mentioned, was, and from thence until such time as last mentioned had been and still was, a reduced lieutenant of his majesty's land forces, viz. a reduced lieutenant in Major Commandant *Elford's* then late corps of infantry, and as such lieutenant he the said plaintiff was for and during the time aforesaid entitled to a certain provision or allowance commonly called half pay, viz. a certain provision or allowance, at and after the rate of 2s. and 4d. per day, payable half yearly; subject nevertheless to a certain deduction thereupon, viz. a deduction of 6d. in the pound on the amount thereof, of which said provision or allowance a certain sum of money, to wit, 83l. before the making of the promise &c thereafter next mentioned, to wit, on 24th June 1790, became and was due and payable to the plaintiff, as such lieutenant as aforesaid, for two years then elapsed, and which said sum of 83l. from thence until and at the time of making the promise, &c, thereafter mentioned was in arrear and unpaid to the plaintiff, to wit, at &c. It further stated that before the making of the pro-

*See Melton. M.P.
Rep. vol. E. p. 22.
25.*

*Note that there
is a case depending
before the excheq.
on this very subject
namely, Stone v.
Lidderdale & the
two Paymasters Genl.
of the Army. The
case was argued
at the Excheq. Equity
sittings 15. Dec.
1794. See 1. Annot.
533. a report of
the case & judgment.*

COURT OF EXCHEQUER

ROBERT STONE, Plaintiff, v. The Duke of Montrose, Defendant.
Robert Stone, Plaintiff, v. The Duke of Montrose, Defendant.
Robert Stone, Plaintiff, v. The Duke of Montrose, Defendant.
Robert Stone, Plaintiff, v. The Duke of Montrose, Defendant.

This important cause was on Monday last heard before the Lord Chief Baron, and the other Barons of his Majesty's Court of Exchequer, and involves a question of very considerable magnitude to the grantors and purchasers of annuities upon the half pay of officers in the army, there being no less a sum than *one hundred thousand pounds* already lent upon such security.

The case is as follows:—In Hilary Term, 1792, the Plaintiff filed his bill in the Exchequer, stating that the Defendant Lidderdale, a reduced Lieutenant of Elford's Corps, received as his pay 40*l.* per annum; being in want of money in October 1782, he applied to Edward Benyon, proposing, that if he, Benyon, would advance him the sum of 120*l.* he would grant and secure to him an annuity of 20*l.* per annum, to be paid out of the said pay. To this proposal Benyon having acceded, the money was advanced, and an annuity bond, and an assignment of the half pay executed between the parties. Till the month of July, 1786, Benyon regularly received the whole of Defendant's half pay, accounting to him for the surplus; at this period the present Plaintiff, for a valuable consideration, the sum of 132*l.* 13*s.* purchased from Benyon, a transfer of his right to the annuity, and a deed poll of this date was indorsed on the back of the assignment. The Plaintiff received the pay from this time till about Midsummer 1788, since which he alleged it had been withheld by the Pay-masters General, and charging that Defendant's assignment of his right to the half pay gave a good and equitable title to his assignees to receive and claim the same, and that such had been the custom, upon production of the assignment; and that the said half pay was now no longer a matter of expectancy or a mere possibility, but an actual right in the Plaintiff, in consequence of the assignment.

To this bill the Defendants put in answers.

Lidderdale admitted the bond and assignment to Benyon, as charged, and also his receipt of the half pay, and the overplus being paid by him to the Defendant; that from the transfer by Benyon to the Plaintiff till Midsummer 1788, the Plaintiff received from the Pay-masters the whole, without accounting to him for the surplus. In consequence of the pay being stopt, and the sum of 83*l.* having become due from 1788 till 1790, the Defendant commenced an action against the Duke of Montrose and Lord Mulgrave, the then Paymasters, for the above sum, which was tried before Lord Kenyon at the Sittings after Hilary Term 1791, when the assignment was produced as evidence against his receiving it; but by the direction of the Judge, the Jury found a verdict for him: and upon a motion for a new trial, the Court were unanimously of opinion, *that the half pay was not assignable*, and refused to grant the new trial. He afterwards, till Midsummer 1791, received his pay, but since that period it has been in arrear, in consequence of the Plaintiff's bill, and submits that his half pay is *not assignable either in law or equity*, and claims to be entitled to receive the same for his own use and benefit.

The answers of the Pay-masters are admissions only, stating the King's warrant for payment of half pay; that they had withheld the Defendant's pay in consequence of a notice from him of his having executed a power to transfer the same to another person; and that where disputes happened among parties, as to the receipt of such half pay, they generally withheld the same, till such disputes were properly adjusted and settled.

After a very ingenious argument by the Counsel on both sides, with many references to cases, *pro* and *con*, the Court declined giving their decrees immediately.

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against
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promise &c, thereafter next mentioned, and during the said two years, divers large sums of money had been duly and regularly issued to, and were then in the hands of, the governor and company of the bank of *England* (a) on account of the paymaster general of his majesty's forces, and to be applied in payment of the half pay due and payable to the reduced officers of the same forces, to wit, at &c; of all which said several premises the said defendants, who before and on the said 24th *June* 1788 were, and from thence to the filing of such declaration had been, and then were, the paymasters general of his majesty's forces, and whilst the said 83*l.* was so due and payable to the said plaintiff as aforesaid, to wit, on 8th *September* 1790 as aforesaid at &c, had notice; and by means of the several premises aforesaid it became and was the duty of the defendants, as such paymasters general as aforesaid to draw upon the said governor &c, of the bank at the request of the plaintiff for the payment of the said 83*l.* to the said plaintiff, specifying in the draught the particular service for which the same was drawn; and thereupon, in consideration of the several premises aforesaid, they the said defendants, so being such paymasters general as aforesaid, afterwards, to wit, on &c, at &c, undertook and then and there faithfully promised the plaintiff to draw upon the said governor &c, at the request of the plaintiff for the payment of the said sum of 83*l.* as aforesaid. It then stated a breach (b). There was another count for money had and received. At the trial of this cause before Lord *Kenyon* at the last sittings at *Westminster* it was agreed that a verdict should be taken for the plaintiff, with liberty to move the Court to set it aside and enter a nonsuit, if they should be of opinion that by law an assignment by an officer of his half-pay is good, and will warrant the paymaster general upon due notice of such assignment to withhold payment of the same to the officer. For if it were good, then the plaintiff was not entitled to recover,

(a) *Vid.* 23 *Geo.* 3. c. 50.

(b) It was intimated that there were some defects in the form of this declaration which the defendant's counsel agreed to wave, saying that the parties only desired the opinion of the Court on the principal question. We apprehend the defect alluded to arose from a provision made in the yearly appropriation act of the money voted for this service, whereby certain rules are required to be observed in the application of the half-pay, viz.

[*inter alia*] that no person having any other place or employment of profit civil or military under his majesty shall have any part of the said half-pay. And the declaration did not negative this or any of the disabilities therein mentioned. His majesty in conformity to the act requires the officers claiming half-pay to produce to the paymaster general affidavits &c, of their not having any other place or employment civil or military &c.

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it being proved that he had regularly assigned the same by a letter of attorney dated in *November* 1783 to another person for a valuable consideration, whose demand was not yet liquidated.

A rule to that effect having been accordingly obtained,

Erskine, and *Bower*, now shewed cause; and relied on the case of *Flarty v. Odlum* (a), as deciding the present; which they observed was determined by the Court on great deliberation, and after having attentively considered the case in 2 *Bl. Rep.* 1137. and all the other cases on the subject.

Bearcroft and *Wood*, *contra*, contended that the plaintiff could not recover, because it was competent to him to assign those sums which he knew he was to receive in future, though they were not due at the time of the assignment. This question was expressly determined in *Stewart v. Tucker* (b) on solemn argument; and, therefore, if this Court still entertained the same opinion which they gave in *Flarty v. Odlum*, it would be proper to have the question put upon the record in order that it might be considered by all the judges. But there are weighty reasons why the determination in *Bl. Rep.* should be adopted; because commissions in the army are avowedly purchased, the prices of them being regulated by the crown, and therefore an officer has such a permanent interest as is the object of sale. With respect to the case of *Flarty v. Odlum*; the question there was whether the officer should be *compelled* to assign his half-pay under the insolvent debtor's act, which distinguishes it from the case in *Bl. Rep.* and the present; and the inclination of the Court to discharge an insolvent might have weighed strongly with them in forming their determination. But this is an action on the case to recover the half-pay of the plaintiff, after he has assigned it over: and though a chose in action be not assignable at law, yet in an action of this nature, which is founded on equitable principles, the defendants ought not to be *compelled* to do an act, which will work manifest injustice to third persons. But

The Court said that, on the best consideration which they had been able to give to this question, they saw no reason to retract the opinion which they had delivered in *Flarty v. Odlum*. That on principles of public policy as well as on account of the interest of the officers themselves they were clearly of opinion that by law such assignments were void. That the half-pay of the officers was not only a chose in action, but that with respect

(a) *Ante* 3 vol. 681.

(b) 2 *Bl. Rep.* 1137.

to such payments as were not due it was also contingent whether or not they would ever be made. But they hinted that the assignee might maintain an action against the assignor on his covenant.

Rule discharged.

1791.

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LIDDER-
DALE

against

The Duke of
MONTROSE
and Another.

The KING against The Inhabitants of LUBBENHAM.

Saturday,
May, 28th.

TWO justices removed by an order *Elizabeth Hutchins*, the wife of *Thomas Hutchins*, (who was then absent from her) and *Hepziba* her daughter, from *Lubbenham* to *Oxendon*: on appeal the Sessions quashed the order, and stated the following case.

"The pauper *Elizabeth* was married about seventeen years ago to *Thomas Hutchins*, who was settled at *Oxendon*. Two years afterwards he was convicted of a highway robbery, and condemned, but reprieved on his insisting as a soldier: he went abroad, and five years after that the said *Elizabeth* (hearing that he was dead,) was married by banns to *Thomas Ponton* at *Lubbenham*. On the 21st day of *October* 1782, about a twelvemonth after *Hutchins* returned (whilst the said *Thomas Ponton* and *Elizabeth* were residing at *Theddingworth*,) the said *Ponton* and *Elizabeth*, who were then living together as man and wife, went together to the parish officers of *Lubbenham* for a certificate to *Theddingworth*, who directed the said *Ponton* and the said *Elizabeth* to be included in the said certificate, and granted it accordingly; acknowledging the said *Thomas Ponton* and his wife, (without mentioning her christian name) to be their parishioners legally settled in the said parish of *Lubbenham*. And they the said pauper *Elizabeth* and *Ponton* returned with it to *Theddingworth*. *Thomas Ponton* was never married to any person but the said *Elizabeth*. *Hepziba* was born during the cohabitation of *Ponton* and *Elizabeth* at *Lubbenham*, and there baptized as the daughter of the said *Thomas Ponton* and *Elizabeth* his wife."

Bower, *Dayrell*, and *Brough*, in support of the order of sessions, contended that the parish granting the certificate were concluded, not only as to the parish to which it was immediately granted, but also as to every other. The case of *Honiton v. St. Mary Axe* (a), which was expressly adjudged on that ground, is decisive of

as their child, this was held sufficient evidence of bastardy to settle the child where born, former husband of the mother was in *England* at the time.

A certificate is only concluded upon the parish granting it with respect to that parish to which it is granted; though it is *prima facie* evidence as to others. And therefore where *A.* granted a certificate to *B.* acknowledging the pauper and his wife to be their parishioners, it is competent to *A.* as between that parish and *C.* to shew that the woman supposed to be the pauper's wife had a former husband living at the time of her marriage with the pauper. But it being stated that a child included in the order was born during the cohabitation of the pauper and his supposed wife, and was baptized although the

(a) *Salk.* 535.

1791.

The KING
against
The Inhabi-
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LUBBEN-
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the point. The court there said that before the statute a certificate was only evidence of a private undertaking between the parishes, in the nature of a contract; but now it is a solemn acknowledgment like the cognizance of a fine, and is conclusive as to all other parishes as well as to that to which the certificate is granted. And that case has always been acted on since. Then this case falls directly within that of *Rex v. Headcorn* (a), (wherein the former was recognized by the court); for there a certificate from *Maidstone*, acknowledging the pauper and *Mary his wife* to be their parishioners was held conclusive on them, although it appeared afterwards that the pauper had a former wife living: and the court there mentioned and relied on the case of *New Windsor* (b), where two persons came into a parish certificated as man and wife, and had there several children; and although it appeared that in fact they had never been married, yet the certificate acknowledging them to be man and wife was held conclusive on the certifying parish, not only as to the parents, but as to their children. Then in this case the certificate ought to be conclusive on the parish of *Lubbenham*, not only with respect to the husband but the wife also; because it is stated in the case that the parish officers directed her to be included in it.

Bearcroft, Galley, and Perceval, contra. First, this certificate is not conclusive on the parish of *Lubbenham* as to these paupers, because that parish only acknowledged *Ponton* and *his wife* to be their parishioners. The wife therefore must be taken to mean the *lawful* wife. And this case cannot be governed by that of *R. v. Headcorn*, because there the supposed wife was mentioned *by name*: but here no name is mentioned. But, 2dly, if her christian name had been mentioned in the certificate, this order of sessions cannot be affirmed, because that will have the effect of separating the pauper *Elizabeth* from her first and legal husband; as the adjudication of the settlement of the pauper *Elizabeth* will be the adjudication of her husband's settlement. *R. v. Higher Walton, Bott* 317. It will be found on examining the certificate act (c), and the cases which have been adjudged upon it, that a certificate is only conclusive against the parish certifying as to the parish to which it is granted. As between those two parishes it operates as an estoppel. But estoppels are not to be favoured,

(a) *Barr. S. C.* 253. In this case Lord Ch. J. Lee said, "this certificate is a most solemn acknowledgement by the parish who gave it" that the parties who are the sub-
ject of it are their *legally settled* inhabitants; 'tis a sort of an *adjudication* that they are so.
(b) 1 *Stra.* 186.
(c) 8 & 9 *W.* 3. c. 30.

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and therefore ought not to be extended beyond those cases already established and well known in the law. Now at common law a certificate was a mere private contract between two parishes, and would at most only have been conclusive as between them; and though it might have furnished evidence against the certifying parish as to the fact of a settlement even with respect to other parishes, yet certainly there was nothing in the nature of it which would make it operate as an estoppel, and prevent the parties alleging the truth. It is therefore to be considered how far the act of parliament carried the binding nature of certificates further than it stood before. Now the only alteration thereby made was that, inasmuch as before it was optional in the parish to which a certificate was granted, whether or not they would receive the pauper under it, it is now made compulsory on them. It is enacted "That every such certificate having been allowed
 " &c, shall oblige the said parish or place (the certifying parish)
 " to receive and provide for the person mentioned in the said
 " certificate, together with his family, as inhabitants of that
 " parish, whenever they shall become chargeable to or ask relief
 " of the parish &c, *to which such certificate was given: and then*
 " and *not before* it shall be lawful for such person and his child-
 " ren, though born in *that* parish, not having otherwise acquired
 " a legal settlement there, to be removed &c, to the parish or
 " place from whence such certificate was brought". There is nothing then in the words of the act which purports to conclude the certifying parish further than as to the parish which is obliged to receive the pauper by virtue of the certificate granted thereunto. Nor does the reason of the thing require the rule to be extended further. It is therefore a sufficient answer to all the cases on the subject, except that of *Honiton v. St. Mary Axe*, to observe that the question arose between the contracting parishes, in which case it was the clear intention of the act to estop the parish certifying from disputing the truth of their certificate. And the authority even of that excepted case may be shaken on several grounds; 1st. Because it proceeds on a supposed similitude between a certificate and the cognizance of a fine, which does not exist either in fact or in law; for, without noticing smaller differences, it is sufficient to say that the nature of the two several contracts is essentially different; the one is to acknowledge a burthensome obligation on one party in relief of the other contracting party, the other is to convey and insure a valuable right to that other. In the latter case no advantage could be taken by the cognizor without contradicting his covenant; but in the

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former no covenant or undertaking is broken as to third parishes with whom no contract is made. 2dly. The reason given in that case for extending the obligation to third parishes is bad, because no other parish than that to which the certificate is directed (a) would be bound to receive the pauper under it; and therefore the obligation is not mutual. 3dly. The contrary was expressly decided in a case of *All Saints v. St. Giles* (b), which was determined a few years before upon full consideration of the words of the statute; there Lord Holt said, that "as to all other parishes (except that to which the certificate was given) they (certificates) are as they were before the act; for the conclusion is only by reason of the words of the act of parliament, which extend only to the parish to which the pauper was sent; by consequence, the conclusion can extend no further". Though he added that "such certificate was *mighty evidence* before the justices". Then if the certificate be not conclusive on the parish of *Lubbenham*, it is competent to them to shew that the paupers are settled elsewhere, which is clearly done in the present case.

Lord KENYON, Ch. J. In the first place, without considering the effect of the certificate, there is no doubt but that the second marriage was void, and consequently that the settlement of the pauper *Elizabeth* continued where her first husband was settled. But it is stated that she afterwards contracted a marriage *de facto* with a person whose settlement was at *Lubbenham*; and that she and her second husband applied to the parish officers of *Lubbenham* for a certificate to *Tbeddingworth*, which was accordingly granted. And therefore the question is, whether that certificate be conclusive against *Lubbenham* as to all the world, or only as between the two contracting parishes. Now estoppels in general are not to be favoured; they are to be extended only as far as the positive rules have gone; because the tendency of them is to prevent the investigation of the truth of the case. It is reasonable that a certificate, which is a kind of estoppel, should protect the

(a) In *R. v. St. Nicholas in Harwich*, Burr. S. C. 171. it was held that a misdirection in a certificate would not vitiate it, because the certificate act did not require any direction at all. But in *R. v. High and Low Bishopside*, Burr. S. C. 381. where a certificate was first delivered to one parish and then to another, Lord Ch. J. Ryder said, "it was neither necessary or proper to deliver it to the second parish;" and that Mr. Norton's rule "that every parish is bound to receive a pauper with a certificate which is not directed

to them," would not hold so generally as he had laid it down. Perhaps the cases may be reconciled in this way; though it be not necessary that a certificate should be directed to any particular parish, yet when it is actually delivered to the officers of any parish, they should keep it as a security to themselves in case any dispute should arise between them and the parish which granted the certificate; and in such a case it never could be delivered to a third parish.

(b) 5 Salk. 530.

parish which acts immediately on the faith of it: by the act of the officers of *Lubbenham* the parish of *Theddingworth* were induced to receive the parties into their parish; but there is no necessity for extending the estoppel any further. In all the cases, except that of *Honiton* and *St. Mary Axe*, the question arose between the parish granting the certificate and the parish to which it was given: that is the only case which extends the doctrine farther; and there it is said that a certificate is conclusive on the parish granting it as to all the world. But the reason given by Lord Ch. J. *Parker*, "that as all other parishes are bound to receive the pauper, so the parish that certifies is concluded as to all other parishes," is not true; for other parishes are not bound to receive the pauper; there must be a particular parish in contemplation at the time of granting the certificate. Therefore as the reason, on which that case was decided, fails, we are delivered from the authority of it. Then what reason is there why the truth of the case should not be enquired into? No injury is thereby done to the third parish; no imposition is practised upon them; neither is there any hardship in it. It would indeed be a hardship on *Theddingworth* parish, who acted on the faith of the certificate, and who were bound to receive the parties mentioned in it, if the certificate were not conclusive in their favour against *Lubbenham*: but that reason does not extend to this parish. Therefore on that ground, and on the principle that estoppels are not to be favoured, the parish of *Lubbenham* ought not to be precluded from enquiring into the truth of the case; and according to the truth of the case it appears that the pauper *Elizabeth* was settled at the place of her first husband's settlement. I am therefore of opinion that the order of sessions, as far as it respects the wife, should be quashed; but affirmed as to the child, because the fair conclusion from all the facts stated is that she was a bastard.

ASHHURST, J. As it appears that the reason given for the decision in the *Honiton* case is false, we ought to establish the law on the principles of good sense, reason, and justice; and they concur in inducing us to say that the certificate ought not to estop the parish of *Lubbenham* from shewing the truth of the case. It ought to be conclusive on that parish as far as it concerns *Theddingworth*, to which it was granted: but there is no reason to extend the effect of the certificate, which was only a contract between the two parishes, to a third which was not bound to receive the persons mentioned in it.

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BULLER, J. The first point that I shall consider is the situation of the daughter, who must be taken to be a bastard on the facts disclosed in the case. It must be recollected that we do not proceed by the same rules when we are determining on an order of sessions as on a special verdict, when we could not say that this child was a bastard unless the jury had found her to be so: but in cases made at the sessions, we are to consider those points which the justices made below, and to assist them in drawing the conclusion which they should have drawn. And on this evidence, there is no doubt but that the child is a bastard; she was even so considered by the parents themselves, who baptized her as their child. Then with respect to the mother's settlement: I agree that the second marriage is bad in point of law, and consequently the woman must be considered as the wife of the first husband. And the question then is, what effect the certificate has with respect to other parishes besides those by and to which it was granted. The case cited, of *Honiton* and *St. Mary Axe* from *Salkeld*, certainly goes the length of saying that it is conclusive as to all the world against the parish granting it. But for the reasons given that case cannot be supported: and the other case, cited from *Salk.* 530. of *All Saints* and *St. Giles*, is the other way, and is founded on sound reasoning; there it is said that a certificate is only *conclusive* as between the two parishes. What is said by Lord *Holt* at the end of that case, namely, that a certificate is also *mighty evidence before the justices* as to all other parishes, is true as far as it goes; and in later cases it has been carried beyond what he meant; for though it be mighty evidence, it is not conclusive. I am clearly of opinion that the authority of the case of *All Saints* and *St. Giles* ought to guide us; and that public convenience also weighs very strongly on that side of the question. In many parts of the kingdom parishes have a great objection to granting certificates, and one reason is lest they should be thereby concluded as to all other parishes. But it is clearly for the benefit of the public that the granting of certificates should be encouraged; because by that mean a pauper is enabled to gain a livelihood in another parish when he cannot in his own; and the more generally they are held to be conclusive, the more reluctant will parishes be to grant them: But if they be only conclusive as between the two parishes, the use of certificates, which are become very beneficial, will become more general. And of late years this Court have proceeded upon the same principle in those cases where they have determined that a

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certificate is discharged by the certificated person leaving the parish to which it was given.

GROSE, J. The case of *Honiton* and *St. Mary Axe* cannot be supported, as the ground on which it proceeded fails. The reason given for that determination was that "all other parishes on that certificate were bound to receive the pauper:" but that is not warranted either by the words or the true meaning of the act of parliament (a). The words are that "if any person shall come into any parish, and bring or deliver to the churchwardens &c, of such parish a certificate &c, such certificate shall oblige the said parish to receive the person mentioned in the certificate, whenever he shall be chargeable to the parish to which such certificate was given." The case of *All Saints* and *St. Giles* was decided according to the true meaning and interpretation of that statute; and a later case, which proceeds on false grounds, ought not to overturn it. As therefore the certificate in this case is only conclusive as between the two contracting parishes, it appears that the woman is settled at *Oxendon*; and as to her the order of sessions must be quashed, and confirmed as to the child.

Per Curiam. Order of sessions quashed as to the mother, and affirmed as to the child.

(a) 8 & 9 W. 3. c. 30. s. 1.

The KING against The Inhabitants of MARTON.

Saturday,
May 28th.

THE pauper *Ralph Dewhurst*, and his wife, and children, were removed from *Marton* to *Singleton*: The Sessions discharged the order of removal, subject to the opinion of this Court on the following case.

A retrospective hiring will not give a settlement.

"It was admitted that the pauper's original settlement was in *Singleton*. When he was about 18 or 19 years of age he went into the service of *W. Fisher* in *Marton*, and staid about a fortnight or three weeks without any hiring or agreement of any kind being made between them. The pauper's father then made an agreement with *Fisher* for the pauper to serve him for a year, at 2 s. 6 d. per week. The fortnight or three weeks which the pauper had been in *Fisher*'s service was to make a part of, and be reckoned in, the year. The pauper staid in *Fisher*'s service upwards of 15 months from his first coming, and received his wages according to the above agreement".

A rule having been obtained to shew cause why the order of sessions should not be quashed,

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Bearcroft, who was to have shewn cause, admitted that the order of sessions could not be supported, because a retrospective (a) hiring was not sufficient. Accordingly the rule was made absolute to

Quash the order of sessions.

Topping was to have supported the rule.

(a) *R. v. Ilam*, Burr. S. C. 304. and *R. v. Hoddesdon*, Cald. 23. S. P.

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The KING against The Inhabitants of NETHERSEAL.

A. occupied a tenement of 10l. a year, and died leaving three children, to two of whom he bequeathed 5s. each, and to the latter, whom he made executrix, the residue of his property. The pauper, who had before married the executrix, resided on the tenement above 40 days, and paid rent for it; this was held to gain him a settlement, tho' the wife never proved the will.

TWO justices removed *Thomas Taylor*, his wife, and five children, from *Finderne* to *Netherseal*. The Sessions, upon appeal, confirmed that order, and stated the following case.

The pauper *Thomas Taylor*, being settled at *Neatherseal* by hiring and service, married the daughter of *John Shipman* of *Finderne*, who rented and lived upon a tenement in *Finderne* of the yearly value of 11l.; part of which, of the yearly value of 6l., was rented of one *Sims*, and the other part of the yearly value of 5l. of Mr. *Gell*. The pauper and his wife continued to live in the family of *Shipman* until his death, which happened about two years after the pauper's marriage. *Shipman* made a will, and, after bequeathing to his son *John Shipman* and an unmarried daughter five shillings each, gave the pauper's wife all the rest of his property and stock upon his tenement, of the value of upwards 40l.; and appointed her executrix of his will. The pauper possessed himself of this property, and paid his brother and sister-in-law their said legacies about a year after *Shipman's* death. The pauper's children got the will out of a box which was left unlocked, and tore it to pieces. The pauper never proved the will on account of the expence, but continued with his wife, the executrix, to occupy the tenement in *Finderne*, from the decease of *Shipman*, which happened on the 9th of November 1774, until the *Lady-day* following, and paid the rent for the same. At the *Michaelmas* preceding the death of *Shipman*, he had a notice from *Sims* to quit his part of the tenement at the then next *Lady-day*, which the pauper did, and took again a part of it at the yearly value of 3l. 3s.

Balguy and *Clarke* in support of the order of Sessions. The pauper gained no settlement by the residence on the estate for 40 days. He either resided there by right, as husband of the executrix, or by wrong, without any title at all. If the latter he

certainly could not gain a settlement; because in order to gain a settlement by 40 days residence on an estate the party should be irremovable those 40 days. In *Rex against Saint Michael's Bath* (a), where the possession had been gained by fraud after the party had conveyed the estate to trustees in trust to pay debts, he did not gain a settlement by residing on it 40 days. Then as to his title as husband of the executrix; that cannot be established without proof of a will; and there can be no legal proof of a will, in order to give a title to the personal estate, but the probate. And, as no probate was produced, or ever granted, the Sessions were not competent to examine into the fact of the wife's being executrix, their finding her such is a mere nullity. Then his possession was merely that of a wrong-doer; and that alone is not sufficient to give a settlement. If administration had been granted to any other person, the pauper might have been turned out on a moment's warning.

Bearcroft and Coke, contra. 1st, With respect to the pauper's title as husband of an executrix, it is sufficient that the sessions have found the fact of her being executrix: The Court will not scrutinize too nicely into the grounds of their opinion. She took upon herself the charge of being executrix, and would have been liable as such: and though she could not have brought an action without formal proof of her title by the production of the probate, yet enough is stated to shew that she had a right to reside on the premises. And the cases where the Court have held that an administrator before letters of administration taken out could not gain a settlement by residence on the estate have been where such person had not the *sole* right to administration. But, independently of the title as executrix, the facts stated are sufficient to give the pauper a settlement, on the ground of his coming to settle on a tenement of the value of 10*l.* a year, and residing thereon 40 days. Such was the case here; the party paid rent to the landlord, who by receiving it recognized his tenancy; and therefore it cannot be said that the husband was a mere wrong doer.

Lord KENYON, Ch. J. If the question depended on the title which the pauper claimed under the will in right of his wife, I think that the facts stated in this case would not warrant us in deciding that they could enforce any right under the supposed will; because the fact of there being a will should have

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(a) *Dougl.* 630.

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been proved in a different manner. We cannot receive any other evidence of there being a will in this case than such as would be sufficient in all other cases where titles are derived under a will; and nothing but the probate, or letters of administration with the will annexed, are legal evidence of the will in all questions respecting personalty. But on the other point, I cannot bring my mind to doubt. It is stated that the pauper resided for more than 40 days on a tenement of more than the yearly value of 10*l.*; for which he paid rent. Then it was said that he might have been turned out of possession by some other person having a superior right: but it was not suggested who had any better title; and the landlord, who received the rent, could not turn him out.

ASHHURST, J. In order to acquire a settlement by taking a tenement of 10*l.* a year, it is not absolutely necessary that there should be an express contract for the tenement: it is sufficient if the tenant reside 40 days on a tenement of such a value with the permission and consent of the landlord; for in such case the law implies a contract.

BULLER, J. Supposing there were no will in this case, the only persons entitled to the property of the pauper's wife's father were the pauper's wife and her brother and sister; and if it were necessary to go beyond the implied contract between the landlord and the pauper, here is sufficient evidence to shew that all the parties interested consented to the pauper's continuing in possession of these premises; for the other son and daughter received 5*s.* each in lieu of all their right and claim to their father's property. Therefore all the parties interested agreed to this occupation by the pauper; and consequently there is no pretence to say that this was a holding by wrong.

GROSE, J. declared himself of the same opinion.

Both orders quashed.

Saturday,
May 28th.

SYEDS *against* HAY.

Where the
owner of
goods on
board a ves-
sel directed
the captain
not to land

TROVER for certain goods. The action was brought by the owner against the captain of the vessel in which they had been shipped; and the only question was whether there was evidence of a conversion to maintain this action. The goods

them on the wharf, against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea of the wharfinger's having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf, the owner upon demand and denial may maintain trover against the captain, unless the latter can establish the wharfinger's right.

goods

goods were left by the defendant in the hands of one *Hawley*, a wharfinger, for the plaintiff's use; and he might have had them at any time by sending there and paying the wharfage. But, previous to their being landed on the wharf, the plaintiff, intending to convey them from the vessel himself, expressly directed the defendant not to land them there, which the latter promised not to do, but nevertheless he did so. The defendant, by way of justification for this breach of orders and promise, attempted to set up a usage that every wharfinger, against whose wharf a vessel was moored for the purpose of unloading, as in the present case, was entitled to the wharfage fees for all goods unloaded therefrom, whether landed on the wharf or not; and that therefore the wharfinger had a lien thereon, of which it was not lawful to divest him. It appeared from several witnesses, who were examined as to this usage, that a claim of this kind had been made by the wharfingers in the port of *London*, which had sometimes been paid and sometimes not; but *in their opinion* it was well founded. And at all events there was a reasonable ground from the evidence to suppose that the captain in this instance had acted from an impression that the wharfinger had such a right. Lord *Kenyon* was of opinion, on an objection taken at the trial, that there was no evidence of a conversion; for, without laying stress on the supposed usage, the goods had been delivered to the wharfinger for the use of the defendant; and that the proper remedy against a carrier for not delivering goods pursuant to orders was by action on the case: but he nevertheless permitted the cause to proceed; reserving this point for the consideration of the Court. The verdict was given for the plaintiff. And a rule having been obtained to shew cause why the verdict should not be set aside, and a non-suit entered,

Bower, and *Kidd*, now shewed cause; contending, 1st, That the evidence of usage offered did not support the right of the wharfinger. The mere opinion of the witnesses is of no weight. Usage must be established either by reputation, or by the actual exaction of the demand. Of the former kind there was none: and of the latter there were (for ought appears) as many instances of denial to, as of compliance with, the demand; and the learned Judge himself thought at the trial that the usage was not satisfactorily established in point of fact. But even if it were, it could not be supported in point of law; as

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was held in *Stephen v. Coster* (a), where the very question arose as to the wharfinger's right to wharfage, when the goods had not been landed on his wharf. And it is no answer to say that that case turned upon the construction of the 22 Car. 2. c. 11., which enables the king by an order in council to regulate the rates of wharfage; for the question was also argued on the ground of the common law, and upon that ground as well as on the construction of the statute was the judgment given. It appears too on inquiry (b) made since the trial of this case that the demand for anchorage and moorage, which is different from wharfage, is paid by the captain of the vessel; and that it is customary when wharfage is paid for the goods not to charge for anchorage or moorage; and therefore the captain was plainly interested in putting these goods into the hands of the wharfinger, in which case it would be a clear conversion. But, secondly, even supposing the captain to have acted as he did merely on the supposition that the wharfinger had such a right, and without any intention of exonerating himself from a charge, yet it has been held that not only claiming property as one's own, but asserting the right of another over it, is, upon demand and refusal, evidence of a conversion. As in *Perkins* assignee of *Hughes*, a bankrupt, against *Smith* (c), where it was found that the defendant sold the goods for the use of his master, the Court held that trover would lie, because the taking upon him to dispose of another's property, though not for his own use, was a tortious act, and the gist of such an action. The same is the case of every sheriff, against whom trover lies for refusing to deliver the goods of one person to another. *Cowper v. Chitty* (d). And yet there is no pretence to say in any of those cases that the party intended to convert them to his own use. And it is said expressly in *Salk.* 655. pl. 4. that though trover does not lie against a carrier if the goods appear to have been really lost by negligence, yet if that do not appear, or if the carrier had them in custody when he denied to deliver them, it is good evidence of a conversion. Now this cannot be imputed to negligence; for it was a wilful disobedience of orders, and is therefore as strong evidence of a conversion as can be stated.

(a) 1 Bl. Rep. 413. 423.

(b) This was only asserted at the bar: but there was no affidavit of it.

(c) 1 Wilf. 328.

(d) 1 Burr. 20.

Erskine, Mingay, and Larwes, contra, admitted that demand and refusal were *prima facie* evidence of a conversion, till explained, but no more; for if conversion be not actually found on a special verdict in trover, judgment must be for the defendant. Now here the refusal was satisfactorily explained; for the goods were delivered to the wharfinger expressly for the use of the plaintiff; and therefore his right to them, so far from being denied, was recognized. The delivery to the wharfinger was in the usual course of trade. There was no evidence of its being done collusively; and if done *bona fide* under an idea, whether well or ill founded, of a right in the wharfinger, trover, which is founded on a *tort*, will not lie; but the plaintiff has his remedy by an action on the case against the carrier for a mis-delivery. The wharfinger may even be considered as the agent for the plaintiff; and all the cases of this kind, where trover has been maintained, such as *Perkins v. Smith*, and *Cooper v. Chitty*, have been either where the *property* has been altered by an actual sale, or the denial has been grounded on an assertion of property in some other person. But they are not applicable to the present case. If the plaintiff had intended to dispute the claim of wharfage, he might have done it by bringing his action against the wharfinger. But supposing it necessary for the defendant to justify his denial under the right of the wharfinger, all the evidence given was in support of such a right; and, however slight, it must be taken to be true, as none was opposed to it. The case of *Stephen* against *Coster* appears to have turned altogether on the construction of the act of *Car. 2.*; for there was no evidence of an usage in that case. And with respect to what is said relative to the anchorage and moorage, it rests merely on assertion, of which the Court can take no notice.

LORD KENYON, Ch. J. It is clear that the plaintiff is entitled to recover either against the defendant or the wharfinger: and if no wharfage be due, of which there was no satisfactory evidence, I think that this action may be maintained against the defendant.

ASHHURST, J. If the wharfage duty be not due, it is clear that trover will lie against the defendant. Or even if the defendant landed the goods on the wharf with the view of sheltering himself from the payment of the moorage-duty, that also would subject him to this action.

BULLER, J. I am of opinion that the objection to the form of the action is not well founded. For the plaintiff gave express

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orders to the defendant not to land the goods on the wharf, to which the latter agreed at the time, but afterwards disobeyed those orders and delivered the goods into the possession of the wharfinger: now on these facts I think that trover will lie. I cannot go on the ground that the wharfinger was the plaintiff's agent: for, so far from it, the plaintiff expressly dissented to the goods being sent there. And if one man, who is intrusted with the goods of another, put them into the hands of a third person contrary to orders, it is a conversion. If a person take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him and paying for the keeping of him, yet it brings a charge on me. So here the defendant by putting these goods into the custody of the wharfinger brought a charge on the plaintiff. And this is a deliberate act, it being done contrary to the orders of the owner, and therefore distinguishable from the case put at the bar of a misdelivery of goods, merely owing to a mistake. So stands the case independently of the evidence respecting the wharfage: but that is very material to be considered; because if the wharfage-duty be due, that will be an answer to the present action. The usage set up at the trial does not appear to be uniform; for, though several of the witnesses said that in their opinion it was due, yet opinion is no evidence, and in point of fact the duty has not always been paid in cases where the goods were not landed. The case in *Bl. Rep.* goes a great way to prove that no such payment can be exacted.

GROSE, J. of the same opinion.

On a subsequent day Lord *Kenyon* said, that the Court had fully considered this case, and were of opinion that no new trial ought to be granted, and that the rule should be discharged.

Per Curiam,

Rule discharged.

Tuesday,
May 31st.

DOE on the Demise of PHILLIPS *against* ALDRIDGE.

A. devised to
B. preacher of
the meeting-
house of *C.*
for life, on
condition
that he should
convey the
premises to

trustees, to take place after *B.*'s death for the use and support of the preaching the word of God at the meeting-house for ever, and in case the preaching there should be discontinued, then over to a charity-school; held that *B.* took an estate for life, though the devise over, after his death, would be void by stat.

9 Geo. 2. c. 36.

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vifed

vifed thus "To the Reverend *Adam Aldridge*, late of *Amesbury* in *Wiltshire*, but now *preacher at the Meeting-house* in *Lyndhurst*, All &c, (describing the premises) To hold to him the said *Adam Aldridge* for and during his natural life only, on this exprefs condition, that he do and fhall without delay after my deceafe settle and convey the fame to trustees, to take place at his deceafe, *for the use and support of the preaching of the word of God at the meeting-house at Lyndhurst aforefaid for ever*; and in cafe fuch preaching fhould be difcontinued, I direct the fame to be applied towards a fchool for teaching the poor children of *Lyndhurst* aforefaid for ever. And I do hereby give unto the said *A. Aldridge* full and abfolute power and authority to settle the fame accordingly." Then followed a bequest of money in the funds to the fame uſes; legacies of 100*l.* to the defendant and the other executor, for their trouble in executing the will; and a bequest of the houſehold furniture in the houſe in queſtion to the defendant for life, with a direction to settle the fame to the uſe of the ſucceeding miniſters, to go as heir-looms. And beſides ſome other legacies the will contained the following clauſes; "And I further *expect* (a) that he (the defendant) will with the help of God after my deceafe, without delay, settle and forward every thing in his power to promote and carry on the work of God at *Lyndhurst* aforefaid, both in his life-time and after his deceafe." "And if it ſhould ſo happen that I have not left any of the aforefaid legacies in a lawful and legal manner, to prevent any advantage being taken thereof, I do hereby give, deviſe, and bequeath, ſuch legacy or legacies unto the ſaid *W. Downer*, and *A. Aldridge*, in *truſt*, to be diſpoſed of by them at their diſcretion for ever."

Durnford, for the plaintiff, contended that not only the limitation ſubſequent to the defendant's life-eflate, but that the life-eflate alſo, was void, by the 9 *Geo. 2. c. 36*; as being a deviſe to a charitable uſe. And he was proceeding to urge that it was a deviſe to the defendant, not in his individual capacity but, *in the character of preacher*, and in confidence that he would continue to perform the duties of that ſtation, from the deſcription given of him by the deviſor, from the *expectation* (b) expreſſed by the deviſor that the defendant "would forward

(a) *Vide* note. b.

(b) "Requeſting," "deſiring," "not doubting" "and hoping" have been held ſufficient to raiſe a truſt, where the property is certain, and the objects pointed out are pre- ciſe and diſtinct. *Harding v. Glyn*, 1 *Atk.* 469.

Eales v. England, *Pre. in Chan.* 200. and the caſes there referred to in the notes. *Buggins v. Yates*, 9 *Mod.* 122. *Harland v. Trigg*, 1 *Bro. Ch. Caf.* 142. *Wynne v. Hawkins*, *ib.* 179. and *Pierſon v. Garnet*, 2 *Bro. Ch. Caf.* 38. 226.

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every thing in his power to promote and carry on the work of God both *in his life-time* and after his decease," and from the proviso at the end of the first devise that, in case the preaching should be discontinued at this meeting-house, the profits of the estate should be applied towards the school; but was stopped by

The Court (a), who thought the point too clear for discussion. For that, though the subsequent limitation was void, the defendant's life-estate was clearly good. That the religious persuasion of the defendant raised no ground of objection to his taking the estate; and that the devise over to the school, in case the preaching should be discontinued, only related to the limitation after the defendant's death.

Gibbs was to have argued for the defendant.

Postea to the defendant (b).

(a) Absent *Asbursft*, J. and *Bul'er*, J.

(b) The last clause appears fraudulent, as being an intended evasion of the statute. *Vid. The Attorney General v. Tyndal*, *Amb.* 614. And

it is distinguishable from the case of *Adlington v. Cann*, 3 *Atk.* 141, inasmuch as this is devised expressly *in trust*.

Wednesday,
June 1st.

The KING against THOMAS NEWELL.

Where a parish consisted of two separate districts, each of which immemorially made a separate rate, but the money when raised was blended together in one joint fund, though applied in certain proportions, and the sessions did not find it as a fact that the parish could not reap the benefit of the 43 of *Eliz.* it was held that the districts were not entitled to maintain their own poor separately and distinctly, though since the year 1648 they have constantly had, in the whole, more than four overseers, and though the hamlet part has immemorially had a constable of its own.

TWO justices allowed a rate made for the relief of the poor of the parish of *Saint Giles* in *Reading*, including the hamlet of *Whitley*, in the county of *Berks*. The sessions, upon the appeal of *Thomas Newell*, confirmed the rate, and stated the following case.

The parish of *Saint Giles Reading* lies partly within the borough of *Reading*, and partly without. The hamlet of *Whitley* is that part which lies without the borough, is about three miles square, and has immemorially had a separate constable. It has also immemorially had a churchwarden, but no other church than that which is common to the parish at large. And the hamlet people have been used to attend the vestry-meetings of the parish at large at the church, but the people of that part of the parish out of the hamlet never attended the hamlet-meetings; for which hamlet-meetings to chuse officers for the hamlet notices were published in the church on the *Easter Sunday* in every year. From the year 1648 to the time of trying this appeal, the inhabitants of the hamlet part of the parish have had overseers of the poor separately appointed for the hamlet, and chosen at meetings of the hamlet-people only; the number of which overseers has varied from that time.

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The hamlet have in every year had either two or three overseers, except in four different years at different intervals, when they had one. Such overseers have separately distributed and laid out the money within the hamlet, and their accounts have been separately kept, and separately allowed by the justices; and it does not appear that any interference has ever been made in the distribution or accounts by the payers in the borough part of the parish, except at the general settlement of accounts as hereinafter mentioned. The part of the parish lying within the borough has during the same time invariably had one churchwarden and three overseers; and such overseers of the borough-part have acted upon their separate rates, and in their distributions and accounts, distinctly from the hamlet and the inhabitants or overseers of the hamlet, except that the overseers of the borough have afforded relief to the poor persons belonging to the hamlet-part of the parish when resident in the borough, and have indemnified themselves out of the general fund arising from the poor-rates, collected as well in the borough-part as in the hamlet-part of the parish, at the general settlement of accounts as hereinafter mentioned. Certificates have in various instances since the year 1709 been separately granted by, and directed to, the overseers of the hamlet of *Whitley* to and by the overseers of divers other parishes; but it does not appear that a certificate has ever been granted by or to the overseers of the hamlet of *Whitley* to or by the overseers of that part of the parish, which lies within the borough. Orders of removal have been made both from and to the hamlet of *Whitley*, and the paupers removed accordingly without appeal; particularly in 1755 an order of removal unappealed from was made from the parish of *St. Lawrence, Reading*; and in 1774 another order was made from the parish of *St. Mary in Reading*: but it doth not appear that orders of removal have ever been made from or to the said hamlet to or from that part of the parish of *St. Giles*, which lies within the borough. In 1649 the following order was made; viz. "April 23d 1749, Whereas at the quarter sessions holden for the county of *Berks*, the 3d of *April* instant, the difference of the rates concerning the poor of the parish of *St. Giles* between the liberty of *Whitley* and the other inhabitants within the borough of *Reading* in the said parish was referred to us; we, upon hearing all parties, do order that the inhabitants within the liberty of *Whitley* shall according to a former order pay the yearly sum of 20*l.* 4*s.* 4*d.*, monthly apportioned according to the statute towards the relief

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of the poor of the parish of *St. Giles*; and that the inhabitants of the parish within the borough shall pay the yearly sum of 35*l.*; and in case the said sums shall not be sufficient for the relief of the poor of the parish, then the liberty of *Whitley* and the other inhabitants of *St. Giles* shall pay proportionably according to the former sums; and in the mean time the overseers of *Whitley*, having seen the accounts of the overseers of the parish of *St. Giles*, and finding the necessities of the poor do require it, shall pay forthwith their proportionable arrears." Signed by two justices. Ever since that order was made the directions contained in it have been observed by the two parts of the parish of *St. Giles* in regard to their respective contributions to the poor, and they have paid accordingly, the hamlet three-eighth parts, and the borough part five-eighths, of the whole expences incurred by the poor of both parts of the parish; *the whole expences, when incurred, being computed into one integral sum*; the overseers of the hamlet part and those of the borough part have accounted with each other reciprocally, according to the above proportion. There has been for several years and now is a poor-house in that part of the parish of *St. Giles* which lies within the borough, in which the poor both of that part and of the hamlet part of the parish have been jointly maintained, and the expences attending such maintenance have been defrayed by the two parts of the parish respectively, according to the proportion of five to three. The overseers of the hamlet have uniformly, as far as any evidence could be had, made rates separately for the hamlet; and it does not appear that since the year 1648 the persons living in the hamlet have ever been charged by a rate made by the overseers of the parish till the rate now in question. In the year 1740 a rate was made in the hamlet, and acted under, entitled, "A rate made by the churchwardens and overseers of the poor of the hamlet of *Whitley* in the parish of *St. Giles, Berks*, as well towards the necessary relief and maintenance of the poor of the parish as of the hamlet, after the proportion of 9*d.* in the pound, charged on the inhabitants of the hamlet;" and such has been in general the mode of intitling all the rates made in the hamlet part of the parish to the time of the present rate. In pursuance of an act of the 26 Geo. 3. c. 56. intituled "An act for obliging the overseers of the poor to make returns upon oath to certain questions therein specified, relative to the state of the poor," separate returns were made by the parish of *St. Giles* and the hamlet of *Whitley*, as distinctly main-
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taining their own poor. The inhabitants of *Whitley* conceiving themselves aggrieved by continuing the payment of three-eighths of the general expenditure, in *September* 1789 the officers of the hamlet gave notice to the officers of the borough part of the parish that they would not pay any rate made by the latter, or contribute to the relief of the poor within the borough part, (except of those belonging to the hamlet of *Whitley* which should from time to time be in the poor-house of the parish of *St. Giles*, for which expence they would contribute their fair proportion according to any rate which should be agreed upon,) it being their intent to apply all future monies raised by a poor rate intended to be separately made for the hamlet to the necessary relieving of the poor only who should belong thereto separately, and without the interference of the parish of *St. Giles* within the borough. After this notice had been given the hamlet of *Whitley* made a rate entitled "A second rate or assessment, made the 2d of *January* 1790 by the overseers of the hamlet of *Whitley* for the necessary relief of the poor of the hamlet at a proportion of 2s. in the pound," which was duly published. And after this notice the next rate but one made by the borough part of the parish of *St. Giles* was the rate in question, and which was entitled a rate for the relief of the poor of the parish of *St. Giles* in *Reading*, including *Whitley* hamlet, part of the said parish, &c; but it does not appear that any former rate for the borough part of the parish made use of the words "including *Whitley* hamlet part of the parish." The appellant, *Newell*, has no property within the parish of *St. Giles* within the borough, but is an inhabitant of the hamlet, and is charged with the rate appealed from for his property within the hamlet. He is charged also to a rate which has been made by the overseers of the hamlet for the same period, which has also been regularly published. Mr. *Newell*, conceiving that he was liable only to the last rate, and not to the rate made by the overseers of the part of the parish of *St. Giles* within the borough, appealed against it.

Erskine, *Douglas*, and *Simeon*, were to have argued in support of the order of Sessions; but the Court desired to hear the counsel on the other side first.

Bearcroft, *Bower*, *Milles*, *Lane*, and *Blackstone*, *contra*. It appears from all the circumstances of the case, taken together, that the parish of *St. Giles*, including the hamlet of *Whitley*, has not in fact had, nor can it have, the benefit of the 43d of *Elizabeth*,
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inasmuch as there have been immemorially more parish officers in the two districts than are allowed by that statute; *R. v. Sir Watts Horton*, ante 1 vol. 374. This then directly falls within the mischief intended to be remedied by the statute 13 & 14 *Car. 2. c. 12*; and consequently these districts are entitled to the benefit of that act. The hamlet of *Whitley* has immemorially maintained its own poor separately from the parish at large; and from the year 1648 it has had a constable of its own, and distinct overseers; there has been no general rate for the whole, but on the contrary separate rates for the borough and hamlet, and the accounts of each have been allowed separately by the justices. Such having been the usage for so great a length of time, there seems to be no reason now to vary from it; and the less as it appears that prior to the time of passing the statute of *Charles the Second* this parish could not, as a parish, enjoy the benefit of the 43d of *Elizabeth*, by maintaining its own poor jointly; which distinguishes this case from those of *Peart v. Westgarth* (a), *R. v. The Justices of Middlesex* (b), and *R. v. Uttoxeter* (c). These districts have been considered as separate and distinct not only by the parish officers of each respectively, as appears by the returns made to the House of Commons under the 26 *Geo. 3. c. 56*, and which therefore ought to bind them, but also by all other parishes; it being stated in the case that certificates have been granted by *Whitley* hamlet and directed to it by other parishes, and that orders of removal have been made to and from the hamlet, and two instances are stated of removals from two other parishes in *Reading*. It does not indeed appear that there ever was any removal from *St. Giles* to *Whitley*: but that may be accounted for by the circumstance of the officers of each district settling accounts every year, when allowances may perhaps have been made by each on that account; and on which supposition the removal from one to the other could have answered no other purpose than that of creating an expence to both. With respect to the order made in 1649, which may perhaps be relied on by the other side; in the first place it was extrajudicial, and cannot therefore be binding upon the hamlet of *Whitley*; and in the next place it was an order framed on the circumstances of the case as they then existed. At the most, the order, coupled with the subsequent usage, can only amount to an agreement by these two districts with respect to the proportion which each should pay: but that

(a) 3 *Burr.* 1610.(b) *Bett* 17.(c) *Deu. l.* 332; and *Cald.* 84.

cannot

cannot vary this question; for the circumstances of such places must fluctuate, by which the proportion must of course be regulated. In *R. v. Leigh* (a), where it was only stated that the township had for 60 or 70 years (and before for any thing that appeared to the contrary) had separate overseers and maintained its own poor separately from the parish at large, it was determined that it was still entitled to that privilege. Now here it is not left to be collected by intendment, but is stated positively as a fact, that such was the state of this hamlet prior to the statute of *Charles* the Second. In *Sir T. Raym.* 476. where the different districts of a parish had distinct officers, made distinct rates, and kept distinct accounts, it was held that they were entitled to maintain their own poor separately. But even if this were a more doubtful question, it has been said by the Court of late years that it is extremely politic to favor the subdivisions of parishes, it having been found by experience that better care is taken of the poor in small than in large districts. And in *R. v. Leigh*, *Buller J.* said that, "though it should appear that a parish had enjoyed the benefit of the 43d of *Elizabeth*, yet if they could not now conveniently maintain their own poor jointly, the Court would permit them to divide themselves, provided there were such legal divisions in the parish as are capable of supporting their own poor separately under the statute of *Charles* the Second." Now this is such a legal division as is capable of maintaining its own poor; for there is a constable in *Whitley*, which is decisive to shew that it is a township.

Lord KENYON, Ch. J. The case cited from *Sir T. Raymond* would have great weight in the decision of a case where the facts are the same: there the Court proceeded on the ground of there being distinct officers, distinct rates, and *distinct accounts*; but in these districts there are not distinct accounts, but on the contrary there is one *joint account for both*. On the facts disclosed in this case, it does not appear that these two districts, which compose one parish, cannot have, nor is it stated that in point of fact they have not had the benefit of the 43 *Elizabeth*: but on the contrary almost every fact in the case goes to establish this point, that they have squared their conduct rather by that statute than by the statute *Car. 2.* For if they had proceeded on the latter, there would have been no communion between them, and they would have acted to all

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purposes as if they had been perfectly distinct parishes. It is indeed stated that there have been removals to *Whitley* from several different parishes; but it is not pretended that there ever was one from *St. Giles's Reading*. Probably distant parishes may have been deceived by these districts having separate overseers, and have concluded from thence that they were separate parishes: but their mis-conception cannot vary the case. The material facts in this case are all included in those few lines which follow the order in 1649. To that order I only refer as a date in the case; for it is extra-judicial: but it is stated that "ever since that order was made, the directions contained in it have been observed by the two parts of the parish of *St. Giles*, in regard to the respective contributions to the poor; that they have paid accordingly, the hamlet three-eighths, and the borough part five-eighths, of the whole expences incurred by the poor of both parts of the parish; *the whole expences, when incurred, being computed into one integral sum*; and that the overseers of each part have accounted with each other." Then it appears to have been only one district, affording one integral fund for the poor of both parishes; and that when one part has over-paid its proportion the other has repaid it: but it was merely for their own convenience that they have subdivided themselves, as is frequently done in other parishes, where one overseer agrees to superintend one part of the parish and another the rest. But with regard to the proportions, agreed upon in 1649, which each district was to pay; those indeed would not be binding at this time, if upon enquiry it should appear that they are unequal, considering the present circumstances of the parish. If that had appeared in the case, which is attempted to be inferred from it, that these districts cannot reap the benefit of the statute of *Elizabeth*, the objection would be well founded: but it appears that they have had the benefit of that statute. The only circumstance that can bear the semblance of an argument against this decision is that these districts have had more than four overseers: but that appeared to be the case in several other parishes, on an enquiry directed by Lord *Mansfield* in *R. v. Loxdale* (a); So that though it may be a very material ingredient in these cases, it is not a decisive one. As therefore it is not stated as a fact in the case that these districts cannot reap the benefit of the 43d of *Elizabeth*, but as it appears (on the contrary) from all the facts, considered together, that they have had

(a) *Bott* 9. 1 *Burr.* 445.

the benefit of it, we should overturn all the authorities, if we were to determine that these districts might now be subdivided.

ASHHURST, J. One material fact is wanting in this case, which occurred in that of *R. v. Sir W. Horton*, where it was stated that those townships could not reap the benefit of the 43d of *Elizabeth*. The justices at the sessions should have found that fact one way or the other. But, though they have not directly stated that fact, they confirmed the rate which was made for both the districts together, which rather shews that in their opinion these places could have the benefit of the 43d of *Elizabeth*. What is decisive in this case is that it does not appear that these districts have ever acted separately, but on the contrary that they have had one *joint sum* for the poor of both parts of the parishes, and that they have settled their accounts at the end of each year.

GROSE, J. (a) Nothing is stated in this case to satisfy my mind that this parish cannot, by reason of the largeness of it, reap the benefit of the 43d of *Elizabeth*; but that on the contrary they have in point of fact had it, except in one or two instances where they have acted otherwise merely for their own convenience. In the first place, there have never been any removals from one district to the other; next, all the poor have been maintained together in one poor-house; and the inhabitants of the hamlet have constantly attended the vestry meetings of the parish. Now these three circumstances convince me that this parish can have, and have had, the benefit of the statute of *Elizabeth*. If they could not, the justices at the sessions should have said so: but they seem to have entertained a different opinion by confirming the rate.

Order of Sessions confirmed.

(a) Absent Buller, J.

The KING *against* REDFEARNE.

Wednesday,
June 1st.

THE defendant, having been convicted before a magistrate in the penalty of 10*l.* under the 29 *Geo. 3. c. 26.*, appealed to the sessions at *Leeds*, where the conviction was affirmed, subject to the opinion of this Court on the following case.

The appellant was a hawker, pedlar, and petty chapman, duly licensed; and on *Friday* the 22d of *February* last, being the market-day at *Leeds*, and during the market hours, he exposed

No hawker can expose goods to sale in any part of a market town but the public market place, by 29 *Geo. 3. c. 26. s. 16.*
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to sale within a house in the town of *Leeds*, and not in the open market-place where the open market is usually held, goods, wares, and merchandizes; the appellant not being an householder there, nor the house in which he so exposed the said goods &c, being an house in which he had opened a room or shop, nor his usual place of abode or of his carrying on business.

By the 29 Geo. 3. c. 26. §. 16. it is enacted that no hawker &c, or any other trading person going from town to town, or to other men's houses, travelling either on foot, or with a horse, or opening a room or shop, and exposing to sale any goods &c, by retail in any town &c, such person not being a householder there, or the same not being the usual place of his abode, or of carrying on his business, shall sell or expose to sale any goods &c, in any city or market-town, or within two miles of the market-place of such city or town, under the penalty of 10*l*. And the next section provides that nothing in the act shall extend to hinder any person from selling, or exposing to sale, any goods in any public mart, market, or fair, but that such person may do therein as he lawfully might have done before the act. A mistaken notion having prevailed with the hawkers in some of the Northern counties, who conceived that under the above proviso they might expose their goods to sale in any part of a market-town as they lawfully might have done before the act, this case was reserved in order that the Court might give their opinion upon the true construction of the act.

Chambre, and *J. Heywood*, in support of the conviction, observed that the word "therein" referred to "public mart, market, or fair;" and that a market does not extend to every part of the market-town, but is confined to the place where the market is actually held. *Godb.* 131. & 8 *Rep.* 127. a.

Cockell, Serjt. and *Balguy*, contra.

The Court said, there was no foundation whatever for the construction contended for by the hawkers, for that the proviso only extended to sales in the public market-places, and on the days of the markets.

Conviction affirmed.

FIELDS One, &c, *against* LEWEN.

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Friday,
June 3d.

A Rule having been obtained to shew cause why the writ of attachment of privilege should not be set aside, because the name of the attorney was not indorsed on it, according to the 2 Geo. 2. c. 23. s. 22, which directs that "every copy of any writ or process that shall be served upon any defendant shall, before the service thereof, be subscribed or indorsed with the name of the attorney or solicitor, who shall be retained or employed by the plaintiff in such writ or process."

When an attorney sues by attachment of privilege, his name need not be indorsed on the writ; for the 2 Geo. 2. c. 23. s. 22, which requires the name of the plaintiff's attorney to be indorsed on the writ, only extends to cases where the attorney sues for another person.

Burrough, now shewed cause, by observing that the Legislature in making this regulation only intended that the defendant should know who carried on the suit against him, in order that he might have an opportunity of applying to such person respecting the particulars of the suit; and that the reason could not apply to a case like the present, where the name of the attorney was in the body of the writ, and where the addition of the name on the back of it could convey no further information.

Morgan, in support of the rule, said that the words of the act were general, and extended to all cases; and that, being positive, the directions of the act could not be dispensed with in any case. But

Lord KENYON, Ch. J. said, the act of parliament does not extend to a case where an attorney sues for himself, but only to those cases where he sues for some other person.

Rule discharged.

SHEPHERD *against* CHARTER.Saturday,
June 4th.

THE defendant having suffered judgment to go by default in this action, which was brought on a bill of exchange, the plaintiff obtained a rule to shew cause why it should not be referred to the Master to see what was due for principal and interest, and why final judgment should not be signed for that sum, without executing a writ of enquiry.

Manley now shewed cause, as well on an affidavit, which attempted to impeach the consideration of the bill, as on the general ground that, though where a precise sum was the subject of the action the Court might dispense with a writ of enquiry, yet they would not in a case like the present, where the damages to

Defendant having suffered judgment by default in an action on a bill of exchange, the Court referred it to the Master to see what was due for principal and interest, without executing a writ of enquiry.

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 SHEPHERD  
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be recovered were uncertain, and where the defendant ought to have an opportunity of contesting before the jury whether or not any interest should be paid, and of shewing payment even of part of the principal.

*Gibbs*, in support of the rule, said that the first answer given to the application was no reason why this question should be referred to a jury, because the contents of the affidavit could not be evidence before them, inasmuch as the defendant could not, after suffering judgment to go by default, be permitted to shew that nothing was due. And he observed that the cases in the Common Pleas (a) furnished a decisive answer to the other objection.

Lord KENYON, Ch. J. In such cases as the present, it is extremely convenient to do what was done in the court of Common Pleas; as the quantum of damages depends on figures, they may be ascertained as well before the Master as a jury. And this is not a new practice; for the last case in the Common Pleas refers to old authorities.

BULLER, J. (b) On the general question there is no doubt; and the evidence disclosed by the defendant's affidavit would not be admissible before a jury.

GROSE, J. said that he knew that the judges in the Common Pleas gave the case before them great consideration before they referred the question to one of the Prothonotaries.

Rule absolute.

(a) *Rasbleigh v. Salmon*, H. Bl. Rep. C. Longman v. Fenn, ib. 541.  
 B. 252; *Andrews v. Blake*, ib. 529; and (b) *Absent Ashburfi*, J.

### The KING against BROWN

Where leave had been granted by the court to file an information in nature of *quo warranto* against a party for claiming to be common councilman of York, and the relator by his replication attacked also the defendant's title as freeman, which had been stated in the introductory part of his plea, the Court refused to strike it out or direct their officer to enter a *noli prosequi*.

THE Court having granted an information in nature of *quo warranto* against the defendant for claiming to be a common councilman of York, the defendant in the introductory part of his plea set forth his title, first as freeman, and afterwards deduced his title as common councilman, to which the former was a previous step. The relator in one of his replications attacked the defendant's title as freeman.

On which account, *Holroyd* now moved that such replication be struck out, or a *noli prosequi* entered by the officer of the court, on the ground that as no person's title to a corporate franchise could be impeached at the suit of a private relator without leave

of



of the court, and as the Court had only given leave to impeach the defendant's title as common councilman, the relator ought not to be permitted indirectly to call in question his title as freeman, which the Court upon a direct application for that purpose would not have permitted, inasmuch as it was sworn that the defendant had been in quiet possession thereof for 12 years (a). But, to a question put by the Court, he answered that he could not find any case to support such an application.

*Per Curiam.* It is admitted that there is no precedent for such an interference by the Court; nor does it appear that they have ever exercised the same discretion in these cases as the Attorney General does in the case of an information filed by him *ex officio*. When a proper case has been laid before the Court to induce them to grant the information, they have never exercised any control over it afterwards, as to the manner in which it is to be conducted.

Rule refused.

(a) *Vid. R. v. Dickin, post.*

COCKERILL and Wife, Executrix of MOODY, *against*  
KYNASTON.

Saturday,  
June 4th.

**T**ROVER for goods. The first count stated the trover and conversion to have been in the life-time of the testator. The second count stated the trover in the life of the testator, and the conversion afterwards. The third count was for a trover and conversion after the death of the testator. At the trial the plaintiffs were non-suited; and a rule having been obtained to shew cause why they should not pay costs to the defendant,

*Marryat*, and *Wigley*, now shewed cause; contending, first, that as the goods, which were the subject of the action, were not assets in the plaintiff's hands till recovered, they were obliged to sue in *auter droit*, and consequently were not liable to pay costs. Now all the evidence offered at the trial was applicable only to the first count, which charges both the trover and conversion in the testator's life-time (a). But if that cannot now be enquired into, the case of *Mason v. Jackson* (b) is decisive, where a contrary case of *Atkey v. Heard* (c) was over-ruled. The authority of the former case is indeed in some degree shaken by *Harris v. Hannay* (d); but there the whole cause of action arose after the testa-

If an executor declare on a trover and conversion in the testator's life-time, and also on a trover and conversion after his death, and be non-suited, he is not liable to pay costs.

(a) In this they were confirmed by *Buller*, J. who tried the cause.

(b) 3 *Lev.* 60.

(c) *Cro. Car.* 219.

(d) *Rep. temp. Hardw.* 204.



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COCKERILL  
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tor's death, which distinguishes it from the present case. And that distinction is confirmed by what fell from the court there; for *Lee*, J. referred to a case in 6 *Mod.* 92. and another in *Salk.* 207; in the former of which *Powell*, J. said that where the property sued for was assets in the executor's hands before recovery, there he should pay costs on the non-suit; and in the latter *Holt* Ch. J. said that if the goods of the testator be taken and converted before they come to the hands of the executor, he should not pay costs on a non-suit in an action brought for the goods, for they were never assets. But even on the last count in this case it is not to be taken that the goods had ever been in the actual possession of the executrix; it is only a constructive possession. In *Bull v. Palmer* (a), where an executor was non-suited in an action on an account stated with him as executor, three of the Judges held that he was not liable to costs, because the action was in right of his executorship, and the money recovered was assets. So in *King, executor, v. Thom* (b), where the payee of a bill of exchange had indorsed it to A. and B. as executors, it was held that they might declare as such in an action against the acceptor. And in *Portman v. Cane* (c), the plaintiff, executor, having declared on a bond given to the testator, was held not liable to costs on a verdict against him, though the breach were assigned after the testator's death; and the reason given was that the plaintiff could only sue as executor. It is also material to be considered that the plaintiffs could not have declared in any other manner; for the action being brought to recover personal property of the wife, she could not have joined with the husband, if the claim had been made in her individual capacity; for then the property would have vested in the husband, and he only could have sued for it.

*Leycester*, in support of the rule, insisted that the Court could not now take into consideration what passed at the trial, for that this question arose upon the record. There it appears that the plaintiffs declared for three causes of action; and though, if the declaration had only contained the first count, they would have been exempt from the payment of costs, because in that the wife must have declared as executrix, yet as they have added two other counts, in which she need not have named herself executrix, they are liable to the costs of the whole. *Jones v. Wilson*, 11 *Mod.* 256. Executors are not expressly excepted out of the

(a) 2 *Lev.* 165.(b) *Ante*, 1 vol. 487.(c) 2 *Lord Raym.* 1413. and 1 *Str.* 682.



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statutes 23 *Hen. 8. c. 15*, and 4 *Jac. 1. c. 3*, which give costs generally to a defendant where the plaintiff is non-suited; they have been held to be exempt from paying costs only by an equitable construction of those statutes in their favour; but that construction ought not to be extended to cases where they are not obliged to sue in their representative capacity. The case of *Mason v. Jackson* (a), which was principally relied on by the other side, was determined on the authority of two cases; one of which, *Bull v. Palmer*, has been since denied to be law by *Treby*, Ch. J. in 1 *Ld. Raym.* 437, but, if law, is inapplicable, because (as is said in 6 *Mod.* 93. on a similar case) "there was no new cause of action, but only a new action upon an ascertaining of an ancient cause, which ascertaining leaves it still a debt of the testator's;" and the other, *Peacock's* case, was misrepresented, as appears by another report of the same case in *Hutton* (b), who himself was one of the judges. In *Cro. Car.* 29. it is said that three of the judges, of whom *Hutton* was one, were of opinion that the defendant should not have costs: but *Hutton's* own report of that case is different; for there it appears that the Court were equally divided. But all the other cases agree that where the conversion, which is the gist of the action, is stated after the testator's death, and the plaintiff is non-suited, he must pay costs, notwithstanding he name himself executor, for that is surplusage. *Worfield v. Worfield*, *Latch.* 220. 1 *Ventr.* 109. *Atkey v. Heard*, *Cro. Car.* 219. 1 *Ld. Raym.* 436. *Grey v. Lockwood*, *Barnes* 132, 4th edit. and *Marsh v. Yellowly*, 2 *Str.* 1107. In *Gale v. Till* (c), where the executor who had brought a writ of error was held not to be liable to pay costs, yet it was said that in trover, if the conversion were after administration granted, and the administrator failed, he should pay costs. And in *Eaves v. Mocato* (d), the Court said that "In trover and conversion by an executor, upon a trover and conversion in the time of the executor, the executor, if non-suit, shall pay costs; for he need not name himself executor, and the goods are assets in his hands though he never recover them." The case alluded to by the other side of *Harris v. Hannay*, in *Rep. Temp. Hardw.* would be decisive of this question, were it not for the first count; for there the husband of the executrix declared on a conversion after the testator's death, stating the trover in his life-time; and the Court, after considering all the cases, held that the plaintiffs, who were non-

(a) 3 *Lev.* 60.(b) *Hutt.* 78.(c) 3 *Lev.* 375; and 4 *Mod.* 244.(d) *Salk.* 314.



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sued, were liable to pay the costs. Then the case cannot be varied by the plaintiffs adding a count, alleging the trover and conversion in the life-time of the testator; for then the payment of costs might always be evaded. And on this point the case in 11 *Mod.* 256. is conclusive.

LORD KENYON, Ch. J. If the plaintiffs could have sued in their individual capacity, they would have been liable to pay the costs: but they could only sue in their representative character to obtain the possession of assets which belonged to the wife, as executrix; and therefore they are exempt from paying costs. It appears that the only evidence offered at the trial was applicable to the first count.

ASHHURST, J. Upon the first count it is admitted that the plaintiffs would not have been liable to costs; and on the trial the evidence was brought to support that count only. That makes an end of the present question; and the addition of the other counts ought not to vary the case, for it does not appear that they were added from litigious or vexatious motives, but from prudence merely to take advantage of any other evidence which the plaintiffs might obtain before the trial.

BULLER, J. The cases upon this subject are so contradictory that it is impossible to reconcile them: but those which are best founded on reason shew that the plaintiffs in this action ought not to pay costs. The case in 3 *Lev.* 375. is a very material one, where the question was whether the administrator should pay the costs of a writ of error. For whether there were any error or not was apparent on the record, and must have been known to the intestate: but, as it was necessary for him to sue in the character of administrator, it was held that he was not liable to pay costs. The case in 2 *Lev.* 163, where the plaintiff executor only declared on an account stated by the defendant and himself, is also a very strong one. So too is that in 3 *Lev.* 60. There are indeed cases the other way. And therefore it is necessary to consider the principle upon which the exemption stands. One rule is that if a plaintiff name himself executor when he need not, and fail, he shall pay costs; as where his declaration states a cause of action due to him personally. Another rule is that a plaintiff cannot join in the same declaration a cause of action in his character of executor with another which accrued in his own right. And that will govern the present question; for if it be true that the last



count in this declaration applies to a cause of action in the plaintiffs' individual capacity, the declaration is bad upon the face of it, and the defendant might have demurred to it. But I am of opinion that every cause of action stated in the declaration accrued to the plaintiffs in their representative character; for though the conversion be stated in the two last counts to have been made in the life-time of the executrix, yet it was a cause of action which accrued to the wife as executrix, and must have appeared so at the trial. If the goods, which were the subject of the action, never were in the actual possession of the executrix, it was absolutely necessary for her to declare in that character: and if no demand were made in the life-time of the testator, it was necessary to declare on a conversion after the testator's death. Even on the third count we are not to conclude that the testatrix ever had actual possession of the goods; and if not, they were not assets till recovered. But the principle, stated in some of the cases cited against the rule, is the true one, that, whether the conversion happened before or after the testator's death, if the goods when recovered would be assets in the hands of the executrix, she must sue for them in her representative capacity; and then she is not liable to costs.

GROSE, J. of the same opinion.

Rule discharged.

The KING *against* BOUGHEY and Others.

Monday,  
June 6th.

ON the 7th of July 1790 the defendants were convicted in certain penalties under the conventicle act (a); on the 14th of July the magistrate issued a summons or order requiring them to pay the penalties: On the 12th January 1791, two persons, having entered into a recognizance to prosecute with effect &c, obtained a *certiorari* to remove the conviction into this court, to set aside which writ a rule was obtained on two grounds; first that the defendant had not given the security required by the 5 Geo. 2. c. 19. s. 2.; which enacts that no *certiorari* shall be allowed to remove any judgment or order of justices, *unless the party prosecuting such certiorari, before the allowance thereof, shall enter into a recognizance with sufficient sureties, &c, in 50l.*

The party prosecuting a *certiorari* to remove a conviction &c, must himself enter into a recognizance with two other persons to prosecute it with effect, &c. by the 5 G. 2. c. 19. s. 2. A *certiorari* to remove a conviction must, by 13 Geo. 2.

s. 18. s. 5., be applied for within 6 months after the date of such conviction.

(a) 22 Car. 2. c. 1.

with

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and Others.

with condition to prosecute the same without delay, and to pay costs if the judgment or order be confirmed. And secondly, because the *certiorari* was not moved for within the time allowed by the 13 Geo. 2. c. 18. §. 5, which directs that no *certiorari* to remove convictions &c, before justices of the peace shall be issued, unless it be applied for within six calendar months next after such conviction, judgment, order, or other proceedings, shall be so had or made.

*Erskine*, in support of the rule, observed first that the words of the 5 Geo. 2. c. 19. were positive, and required at least two sureties in addition to the recognizance of the party himself, who prosecuted the *certiorari*; whereas in this case there were only two sureties, exclusive of the parties themselves. And, secondly, that more than six months had elapsed between the date of the convictions and the time of suing out the *certiorari*.

*Bearcroft* and *Leycester*, *contra*, insisted that under the 5 Geo. 2. it was not necessary for the person convicted to give security, it being sufficient if the party who prosecuted the *certiorari* did so; and said that according to the constant and uniform practice of the Crown Office (a) two sureties only were sufficient. In answer to the second objection, they observed that the writ was sued out within six months after the order of the magistrate, by which the defendants were required to pay the penalties. But

*The Court* thought that both the objections were well founded. First, that the words of the 5 Geo. 2. c. 19. were positive, and could not be dispensed with. And, secondly, that the *certiorari* ought to have been applied for within six months after the conviction.

Rule absolute.

(a) In which the officers of the Crown-Office agreed.

Hilary Term.

The KING against DICKIN.

The court  
will not grant  
a *quo war-  
ranto* infor-  
mation a-  
gainst a per-  
son who has  
been in the  
peaceable  
possession of  
his franchise  
six years.

**T**OPPING moved for a rule to shew cause why an information in nature of a *quo warranto* should not be filed against the defendant to shew by what authority he claimed to be a freeman of the borough of *Newcastle*. The affidavits stated the usage of the borough to be [*inter alia*] that no person was entitled to his freedom by servitude other than such as had served an apprenticeship for the full term of seven years within the borough under a legal indenture; and who had demanded and actually taken up his freedom within a year after the ex-  
piration



piration of his apprenticeship. It was also stated that, in a late conversation between the relator and the defendant, the latter informed him that he had gained his freedom by apprenticeship; that his apprenticeship had expired in 1765, but that he did not take up his freedom till 1772. This rule was moved on a former day when it was refused; but the motion was urged again on this day by

*Topping*, who said that since the rule of limiting these applications within twenty years had been laid down by Lord *Mansfield* in the *Winchelsea* cases (a) no instance had occurred of a rule *nisi* having been refused merely on the length of time under twenty years; though that circumstance might have entered as an ingredient in the judgment of the Court upon several applications of this sort. On the contrary that rule had been recognized in several subsequent cases; *R. v. Carter* (b), *R. v. Binstead* (c), and very lately by this Court in *R. v. Bond* (d).

The Court said that the ground of their refusing the rule was not merely the length of time, though, being nineteen years, that weighed very strongly: but that they had refused to interfere on account of the insidious manner (as it appeared to them) of acquiring the knowledge of the defect in the defendant's title, by drawing him into a confession. The only rule, which had ever been laid down to regulate the discretion of the Court on this subject, was that after 20 years they would on no account whatever disturb the possession of such a franchise; but that within that time each case stood on its own circumstances.

Lord KENYON observed that prior to the *Winchelsea* cases, in *Mich. Term 1757, Rex v. Stephens* (e), a rule *nisi*, upon an application of this sort, had been refused solely on the ground of length of time.

BULLER, J. said that he had long been satisfied, according to what he had observed in *The King v. Stacey* (f), that the limitation of twenty years within which time these applications might be granted was much too long a period. That at the time when the rule was laid down in the *Winchelsea* causes the Court were certainly unapprized of several cases which had been determined before that time; *R. v. Pike & Prideaux, Tr.* 10 Geo. 1. *Rex v. Johns* there cited, and *Rex v. The Mayor*

(a) 4 Burr. 1962.

(b) Cowp. 58.

(c) *Ib.* 75.

(d) *Ante*, 2 vol. 767.

(e) 1 Burr. 433.

(f) *Ante* 1 vol. 4.

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of *Helleston*, Hil. 12 Geo. 1. (a), which were decided entirely on the ground of length of time, though considerably within twenty years. And he suggested for the consideration of the Court whether it would not be adviseable to adopt some rule for limiting their discretion upon applications of this nature in future within twenty years.

The rest of the Court concurred in the propriety of this consideration; and said that they would advise upon the matter. And on a subsequent day in this term

Lord KENYON, Ch. J. Read the following

*General Rule.*

THAT the Court had resolved in future to limit their own discretion in granting applications of this nature to six years, beyond which time they would not under any circumstances suffer a party who had been so long in possession of his franchise to be disturbed. And he afterwards observed that there was great weight in the observations of Sir *Fletcher Norton* in one of the *Winchelsea* cases (b), that the limitation of twenty years laid down by the Court was much too long, and contrary to the intent of the 9 Ann. (c).

(a) Mr. Just. *Bullen* read these cases, which are already in print. *ante* 3 vol. 311.

(b) *R. v. Wardroper*, 4 Burr. 2024.

(c) The above case and general rule were not inserted in the Reports of last *Hilary*

Term, on account of a bill which was shortly afterwards brought into the House of Commons to explain and amend the stat. 9 Ann.; the progress of which bill has been since suspended by a prorogation of parliament.

*The Court made the following Order,*

IT IS ORDERED that from and after the last day of *Trinity* Term next, where any affidavit is taken by any Commissioner of this Court made by any person, who from his or her signature appears to be illiterate, the Commissioner taking such affidavit shall certify or state in the jurat that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same, and also that the said party wrote his or her signature in the presence of the Commissioner taking the said affidavit.

The END of EASTER TERM.



# C A S E S

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ARGUED and DETERMINED

IN THE

Court of KING'S BENCH,

IN

Trinity Term,

In the Thirty-First Year of the Reign of GEORGE III.

The KING against JOLLIFFE.

Saturday,  
June 25th.

**A**N information having been granted against the defendant in *Michaelmas* term last for a misdemeanour, as a magistrate, it went down to be tried before *Gould, J.* at the last *Surry* assizes; when an application was made to him to put off the trial upon the affidavits of *Mr. Smith, Dr. Weller,* and *Mr. Barnes.* The first of whom deposed that three days before, the defendant at *Kingston* where the assizes were held gave him four printed papers, one of which was annexed, and asked him whether he had seen any of those papers. That when the deponent received them he was about to read one, when the defendant desired he would put them in his pocket, which he did. And that he afterwards delivered one of them to *Dr. Weller* at his request; but had not till the present occasion had any conversation with any person concerning the contents. The affidavits of *Dr. Weller* and *Mr. Barnes* confirmed the receipt of the paper by the former from *Mr. Smith* in the manner stated by *Mr. Smith*; and it also appeared from *Dr. Weller's* affidavit that he had delivered the papers so received from *Mr. Smith* to *Mr. Barnes,* solicitor for the prosecutor, with-

A criminal information having been granted against the defendant, he, before the trial at *nisi prius,* distributed hand-bills in the assize town, vindicating his own conduct, and reflecting on the prosecutor's; this matter being disclosed to the judge at *nisi prius* by an affidavit was held a sufficient ground to put off the trial.—And that affidavit being returned to this Court, they granted ano-

ther information on it against the defendant; considering the affidavit, taken at *nisi prius,* as taken under the authority of this Court.

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out knowing the contents. The substance of the paper so delivered was a vindication by the defendant of his conduct upon the charge contained in the information then pending, and an imputation of malicious motives in the prosecutor. Upon these affidavits the trial was put off, on the motion of the prosecutor's counsel, suggesting that the papers had been published with a view of prejudicing the trial; and the affidavits were returned into this court by the associate. In the last term an application was made to this Court and a rule *nisi* was granted for another information against the defendant, upon the affidavit of Mr. Barnes, stating that the former trial had been postponed on the ground of the matters disclosed in the above affidavits of Mr. Smith and Dr. Weller, which were annexed thereto, together with the printed paper in question, and that Mr. Smith and Dr. Weller, when requested to make affidavits to the same effect as before for supporting this application to the Court, had declined doing it. Mr. Barnes then deposed, as before, that he had received the printed paper annexed to the affidavit sworn at the assizes from Dr. Weller, who said he had received the same from Mr. Smith, and that he had heard Smith say what he had afterwards sworn in court, that he had received four of the said printed papers from the defendant at Kingston. There was also the usual affidavit from the prosecutor Mr. Fanshawe, denying the suggestions contained in the paper as far as respected himself, and that he did not make the application from any malice against the defendant.

Piggott, Shepherd, and Adam, now shewed cause against the rule, on two grounds; First, that the affidavits of Smith and Weller could not now be taken into consideration, because they were not made in this court, nor in this cause. They were not made in this court, but before the judge at *nisi prius*, who does not derive his authority from this Court, but from the statute *Westm. 2. (a)*. In *Bullock v. Parsons (b)*, Lord Holt said "The authority of the judge at *nisi prius* is not by the *disfringas*, but by the commission of assize." And though the judge, by possessing the power of trying the cause at *nisi prius*, has also incidentally the power of deciding a preliminary question whether or not the cause shall be tried, and consequently of taking an affidavit for the purpose of enabling him to decide that point, yet such his incidental authority is confined to the particular question then discussed before him, and he has no jurisdiction

(a) 13 Ed. I. c. 30.

(b) Salk. 454.



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to take an affidavit for any other purpose. Neither were these affidavits made in this cause, but in the former one of *R. v. Jolliffe*; and the circumstance of the parties being the same in both cannot vary the question. It is in every day's experience for the Court to refuse to hear affidavits read, unless they be entitled and made in the very cause pending; and affidavits, which are made for one purpose in one cause, cannot be used for another purpose in another cause without being re-sworn. Now these were made *diverso intuitu*; merely as the foundation of another proceeding, and without any view to the present application. Then if the Court cannot receive these two affidavits, the others do not disclose sufficient evidence to warrant the Court to grant the information. It will not be pretended that the evidence of *Barnes* alone would be sufficient; and what he heard *Dr. Weller* and *Smith* say cannot be received as legal evidence. This is materially different from *R. v. Archer* (a), where affidavits were permitted to be read containing expressions of the defendant, aggravating his guilt, used by him in the hearing of two persons, and by them related to the persons making the affidavits. For, in the first place, it was there stated, and taken as the principal ground of decision, that the parties, who refused to make the affidavit, were under the control and influence (d) of the defendant; which is not even suggested here. In the next place, the defendant in that case had been already convicted on other evidence; whereas here, this is the only evidence on which the accusation itself is founded. But, secondly, there is no evidence of a publication of this paper, which is of the very essence of the offence; for it is only stated that the defendant gave some of these papers to a friend with express directions to put them in his pocket; and it appears that they were afterwards insidiously obtained from that friend by the contrivance of the prosecutor's solicitor.

*Morris*, and *Erskine* (a), in support of the rule, insisted that these affidavits were taken in this Court, they having been taken by a judge who was a delegate of the Court, sitting at *nisi prius* to try the records issuing from hence. It may be admitted, with *Lord Holt*, that the judge at *nisi prius* does not derive his authority from the *distringas*, but under the commission: but by that

(a) *Ante*, 2 vol. 203. n.(b) *Vid. Kel.* 55.(c) *Bond*, *Serj.*, *Wood*, and *Lawes*, werealso to have argued on the same side; but the Court were satisfied with the arguments of *Mr. Morris* and *Mr. Erskine*.



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commission an authority is delegated to him to represent the court whose causes he is to try. Formerly all causes, which originated in this Court, were tried at bar; and it was only for the ease of the court and suitors that the statute was passed to enable the judges to try them at *nisi prius*: but the day at *nisi prius* and the day in bank are considered the same; the jury process is returnable here; and even still in causes of great importance this Court retains the record and awards a trial at the bar of the court. And what passes at *nisi prius* is so far considered as done in this Court, that, if a witness do not obey a *subpœna*, this Court will grant an attachment against him. These affidavits then must be considered to all intents as made in this Court; and they contain all the essentials of an affidavit, so that perjury may be assigned on them, if they be false. If then they were sworn in this Court, it is not necessary that they should have been made directly with a view to this application; for being returned here by the officer at *nisi prius*, and filed on the records of the Court, the Court might of themselves award an attachment on them against the defendant for a contempt; and if they be sufficient to warrant that mode of proceeding, a *fortiori* are they to ground an information upon. But even if it rested merely on the affidavit of *Barnes*, that alone contains sufficient evidence to induce the Court to interpose by granting an information. The case of *R. v. Archer* is much stronger than the present; for there hearsay evidence was received to affect the judgment of the court, and encrease the punishment of the defendant, whereas this is merely brought forward for the purpose of instituting an enquiry into the defendant's innocence or guilt. And the defendant in this case, as in that, had an opportunity of denying this part of the charge, which by his silence he must be taken to have confessed. The second objection relative to the publication seems totally groundless, since it is more probable that the circulation of these papers (which were printed) would be encreased by means of the friends of the defendant, than if he had distributed them only to indifferent persons. And the manner of introducing the subject to his friend, by asking him whether he had already seen any of them, is strong evidence, not only of his wishing this friend to distribute some of the four papers which he then delivered to him, but of his having also circulated others before.

Lord KENYON, Ch. J. Before I give my opinion on the principal question in this case, I cannot but express my entire



concurrence with what was done by the learned judge before whom the former information was to be tried. It appeared to him by the affidavits then made, and which are since transmitted to this Court, that, during the course of the assizes where the record was sent down for trial, certain papers were distributed by the defendant, which could not have been done with any other view than that of influencing those who were to decide on the question then in agitation. If there never had been any precedent before, it is impossible (I think) that any judge, who wished to administer upright justice, could hesitate what step to take on such an occasion. But the case has happened before (a), and in this same county, where papers having been distributed by the prosecutor to influence the decision of a popular question, a right of way claimed through *Richmond Park*, the prosecutor's own counsel moved to have the trial postponed, which was accordingly granted.

With respect to the principal question; we are not now to determine whether or not the defendant be guilty of the offence which is imputed to him, but merely whether sufficient matter appear to warrant us in putting the guilt or innocence of the defendant into a constitutional course of trial. Before we send it down to be tried, it is necessary for us to be convinced that the *corpus delicti* stands established. Now it is impossible for any man to doubt whether or not the publication of these papers be an offence. Even the charge on the prosecutor would of itself warrant us to grant the information; but that is a minor offence, when compared with that of publishing the papers in question during the pendency of the cause at the assizes, and in the hour of trial. It is the pride of the constitution of this country that all causes should be decided by jurors, who are chosen in a manner which excludes all possibility of bias, and who are chosen by ballot in order to prevent any possibility of their being tampered with. But if an individual can break down any of those safeguards which the constitution has so wisely and so cautiously erected, by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts. And therefore I cannot forbear saying, that, if the publication be brought home to the defendant, he has been guilty of a crime of the greatest enormity. But it has been objected that the publication was extorted; to which I answer that it was not extorted from the defendant; he was a volunteer in the

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(a) *R. v. Martha Gray*, 1 *Burr.* 510.



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business; he voluntarily delivered four of these *printed* papers to Smith, introducing the conversation with a question to Smith whether he had before seen any of them, which was a direct avowal of the publication. And it is not necessary in a prosecution for a libel to prove a publication to several persons; publication to one is all that is required. Then the only remaining question is, whether or not there be any legal evidence before the Court to affect the defendant with this charge. Before the statute 4 & 5 W. & M. c. 18. it was in the power of any individual to file an information, without disclosing to the Court the grounds on which it was exhibited. But that practice being attended with the inconveniences recited in the preamble to that statute, it was enacted that no information should be filed without the express order of the Court publicly given. That statute does not enumerate the grounds which are sufficient to enable us to grant the information, but the Legislature left it to our discretion, trusting that we should not so far transgress our duty as to go beyond the rules of sound discretion. In ordinary cases affidavits are sworn in the Court for the express purpose of praying an information upon them: but that does not preclude us from granting an information on affidavits equally authentic, although not made for that purpose. It has been said that in no case whatever can the proceedings in one cause be made use of in another: But the contrary is in every day's practice. In the Court of Chancery depositions taken in one cause are frequently read in another, saving all just exceptions, as that they are not between other parties &c. So, in courts of law, the evidence which a witness gave on a former trial may be used on a subsequent one, if he die in the interim; as I remember was agreed on all hands on a trial at bar in the instance of Lord Palmerston; but, as the person who wished to give Lord Palmerston's evidence could not undertake to give his words but merely to swear to the effect of them, he was rejected. So also when a motion is made in this court to set aside interlocutory proceedings on affidavits which disclose criminal matter against an attorney or any other officer of the court, the court perpetually directs a criminal enquiry into the conduct of such officer, although the affidavits be filed without any view to any criminal proceedings. Again too, when affidavits are made in this Court, impeaching the conduct of magistrates, they are frequently ordered to be laid before the Lord Chancellor to enable him to judge whether or not such magistrates ought to be continued in

*I cannot agree in this position. The power was vested in the master of the Court, & if he suffered this power to be exercised on the application of every individual at to file an information as a thing of course, it was an abuse of official power.*



the commission of the peace. We have also been furnished with a note, taken by an officer of the court, in which Mr. *Bower*, who had moved in a cause of *Cooke v. Schmoll* for the defendant's discharge upon affidavits filed in that cause, afterwards (a) moved again on reading *those affidavits* and others filed in the cause of *Da Costa v. Schmoll* for his discharge also in the latter, and the clerk of the rules doubted as to drawing up the rule upon affidavits which had not been filed in the latter cause; but we were of opinion that, being filed regularly in the first cause, they might be read as the foundation of the rule in this, and directed him to draw up the rule accordingly. In short all that is required in an affidavit, as the foundation for a criminal information, is that which is required in every other cause, that the affidavit be made in a judicial proceeding, where the party swears at the hazard of a prosecution for perjury, if it be false. Now these affidavits were taken before a judge who had authority to administer an oath, they were made in the course of a judicial proceeding, and relevant to the material point in issue. And the original affidavits are now before us on the files of the court, for they were transmitted here by the officer of the court below. It is not necessary for us to decide whether those affidavits were taken under the authority of this Court, though I confess I have a strong opinion on that point. The judges at *nisi prius* try the causes upon records issuing out of the several courts of *Westminster*, which are returned to the several courts out of which they issue. In cases sent from the Exchequer, I believe a commission goes to try each cause. So too in *Chester* the record is sent down by *mittimus*. And this is in substance the same. However I do not ground myself on that point: I am satisfied that there is sufficient ground for this court to grant an information on the affidavits now before us, without referring to the authority under which Mr. Justice *Gould* sat. Upon the merits I will not now give any opinion; but it would be a discredit to the administration of justice if we were to refuse granting an information on the evidence laid before us.

ASHHURST, J. I perfectly agree that there is ample ground to induce us to interpose in this case by granting an information against the defendant. The crime with which he is charged is of the most malignant nature; the distribution of these papers could not have been made with any view but that of prejudicing the minds of those, who were to decide on the guilt or in-

(a) Nov. 24th, 1788.

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The KING  
against  
JOLLIFFE.



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nocence of the defendant himself on a former charge. But an objection has been made to the manner in which this evidence is laid before us, for that the affidavits were neither made in this court or in this cause, but merely for the purpose of putting off the trial of another. It is immaterial with what view they were made; the question is whether they contain sufficient matter to satisfy our consciences that the information ought to be granted. But the affidavits were made in the course of a proceeding upon the trial of a record sent down by this Court; I do not therefore hesitate to say that every thing which was done at the assizes was virtually done under the authority of this Court. For though the authority of the judge at *nisi prius* is derived under a particular act of parliament, yet it is the authority of this Court which is so delegated to him. Upon the question of publication I have no doubt: four of these papers were given by the defendant to *Smith*; if they had been only given with a view to *Smith's* reading them himself, that would have been sufficient, for the fact of giving papers to another person to read is a publication: but it does not rest there, for it is clear that they must have been delivered to *Smith* with the view of his sending them forth into the world, by the defendant's asking him whether he had not already seen them. This manifests a consciousness in the defendant of having taken all due diligence to circulate the publication of these papers. And the circumstance of the application, which was afterwards made to *Smith* for a perusal of the papers, shews the notoriety of the publication.

BULLER, J. This subject having been so very fully discussed already, I will confine myself merely to the question whether the affidavits, which were taken at the assizes are properly before the Court, and whether we are not bound to receive and to take notice of them. In the trial of a cause issuing out of this court, I am of opinion that the judge at *nisi prius* must be considered to all intents as acting under the authority of this Court, and as an emanation of the Court. If we think proper we may try any cause, which is commenced here, at the bar of the court: it was for the ease of the several courts of *Westminster* and the suitors that the Legislature enacted that causes might be tried in the counties where they arise; but if a cause be of great importance, or likely to be attended with considerable difficulty in the trial, it is still the practice of the courts to retain it, and not send it down to trial at *nisi prius*. And in cases where we send a record down to be tried, and for some cause it is not  
so



so tried, we are to enquire what is become of the record and to know for what reason it was not tried: or if it be tried, and the verdict be not warranted, we are to correct it in this court. In short whatever is done in any stage of the cause is considered as done in the court: and the judge at *nisi prius* acts directly under the authority of this Court. The case was well put at the bar of a witness incurring a contempt for not appearing at *nisi prius*; when this Court interposes; because such a contempt prevents the execution of justice to the parties who stand before them. These affidavits then being made before the judge at *nisi prius*, when sitting to try a record sent down from hence, were taken under the authority of this Court; and we should degrade the judge at *nisi prius* if we were to put him merely on the footing of a commissioner who is appointed by the Court to take affidavits. If then he be considered as representing the authority of this Court it answers two of the objections, first as to the competency of the authority to take the affidavits; and, secondly, as to the liability of the parties to an indictment for perjury, if they swore falsely. The next objection is that these affidavits were not made in this cause: but my Lord Chief Justice has already mentioned several cases to shew that such an objection is ill founded, and that the affidavits may be read even to affect other persons than the parties to the cause, as attornies and other officers of the court. There is also another case, which in point of reason goes a great way to support the answer to this objection. Lord *Hale*, and every other crown lawyer, state that if to an action for slander in charging the plaintiff with felony a justification be pleaded, which is found by the jury, that of itself amounts to an indictment, as if it had been found by the grand inquest: and yet the jury in such a case are merely sworn to try the issue joined between those two parties, and not to enquire for the king: but inasmuch as it is found by a jury of 12 men, it is sufficient to put the party thus accused on his trial. Now that is strong to shew that what is said in a civil proceeding may be taken as the foundation of a criminal one.

GROSE, J. So much has been already said by the bench on this case that it is sufficient for me to declare my perfect concurrence with every part of the judgment delivered.

Rule absolute.

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The KING  
against  
JOLLIFFE.



1791.

Tuesday,  
June 28th.

DOE, on the several Demises of COOPER and Wife, and SUSANNAH HEAD, and ELEANOR HEAD, against COLLIS.

*Issue* is either a word of purchase or limitation as will best effectuate the devisor's intention.

Therefore where A. devised his estate to his two daughters to be equally divided between them, *sc.* one moiety to one and her heirs, and the other moiety to the other for life, and after her decease to the issue of her body and their heirs for ever, and she had one child living at the time of the devise, the second took only an estate for life, with remainders to her children, as purchasers.

*In however 5 Term Rep. 299.*

J. NEWSOM, being seised of certain lands in *Cambridgeshire*, in January 1761 devised them to his wife during the term of her natural life only; remainder "to his daughters *Eleanor Newsom* and *Susannah* the wife of *William Head*, to be equally divided between them, not as joint-tenants but as tenants in common, (*viz.*) the one moiety or half part thereof to his daughter *Eleanor Newsom* and her heirs for ever, and the other moiety to his daughter *Susannah*, the wife of *William Head*, during the term of her natural life, and after her decease to the issue of her body lawfully begotten, and their heirs for ever." The devisor died in 1762; and his wife in 1772. *William* and *Susannah Head* had three daughters, who are the lessors of the plaintiff, namely, *Elizabeth* (the wife of *W. Cooper*), born in November 1755; *Susannah*, born in May 1762; and *Eleanor*, born in May 1768. In Trinity term 1771 *William* and *Susannah Head*, for the purpose of barring all estates tail, levied a *fine sur conusance de droit come ceo*, &c. of the moiety of the premises so devised to *Susannah*; the uses of which were declared to be to *W. Head* in fee; and under that fine the defendant claims. *Susannah* the wife of *W. Head* died in August 1775; and *W. Head*, her husband in November 1777.

*Woodroffe*, for the plaintiff, contended that *Susannah Head* took an estate for life only, with vested remainders to her children, as purchasers; for that "issue" might be construed to be either a word of limitation or of purchase, as would best effectuate the devisor's intention; 2 Lord Raym. 205; and 2 Wilf. 323. Now here it was the intention of the devisor that Mrs. *Head* should only take for life, and that her children should take as purchasers, for at the time of the devise she had one child living. And in *Wild's* case (a) this distinction is laid down, that if land be devised to husband and wife, and to the men children of their bodies begotten, and they have no issue male at the time of the devise, they shall have an estate tail: but if a man devise lands to A. and to his children, or issue, and they then have issue of their bodies, there his express intent will take effect,

(a) 6 Rep. 17. b.

and



and *A.* will take only an estate for life. So in *Goodright d. Docking v. Dunham* (a), where the devise was to *Jeffery Lawing* for life, and after his death to all and every his children equally, and to their heirs, and in case he die without issue, then over; it was admitted, and so taken by the Court, that *issue* meant the same as *children*, and would not convert the estate for life to *Jeffery* into an estate tail; but they held that, if he had had any children, they would have taken a fee. Again in *Luddington v. Kime* (b), where the devise was to *E. Armyn* for life, without impeachment of waste, and in case he should have any issue male, then to such issue male and his heirs for ever, and if he should die without issue male, then over; it was held that *E. Armyn* only took an estate for life, and that his issue, if he had any, would have taken a fee by purchase; and that the devisor used *issue* as a description of the person, because he added a farther limitation to the issue, viz, and to the heirs of such issue for ever. The same doctrine is to be found in *Clerke v. Day*, *Moor* 593, and *Cro. El.* 313; *Archer's case*, 1 *Rep.* 66. b.; and *King v. Melling*, 2 *Lev.* 58. In those cases, *Roe d. Dodson v. Grant* (c), and *Doe v. Applin* (d), where issue has been held to be a word of limitation, it was so construed upon the same principle on which it is contended in this case to be a word of purchase, namely, to effectuate the intention of the devisor; for in neither of those was there any issue living at the time of the devise. This distinction seems to pervade all the cases, that, if there be no children living at the time of the devise, issue is taken to be a word of limitation; but if there be any, and if words of limitation be added to *issue*, it is construed to be a word of purchase, because those circumstances strongly evince the devisor's intention that he used it in that sense. Here both those circumstances concur; and, consequently if the children of *Susannah Head* took as purchasers, the fine levied by their mother, who was only tenant for life, does not bar the lessors of the plaintiff.

*Wilson*, for the defendant, contended, first, that *issue* in a will, when used in the plural number, must be considered to be a word of limitation, unless coupled with other words to shew a different intention, and that in the present will there were no such words to satisfy the Court that it was used as a word of purchase. It is to be observed that it is not a devise to Mrs.

(a) *Dougl.* 264.(b) 1 *Ld. Raym.* 205.(c) 2 *Wilf.* 322.(d) *Ante* 82.

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COLLIS.

*Head for life only*, though the devisor used those words in the devise to his wife; that there were no trustees to preserve contingent remainders, which would have been added, if it had been intended that the issue should take as purchasers; that the devise to Mrs. *Head* is not without impeachment of waste; and that it is a legal, not a trust, estate. It is also to be remembered that at the time of making the will there was but one child *in esse*; and it is perfectly clear that the devisor did not intend that that child only should take, for then he would have said to that issue and *her* heirs, whereas the devise is to the issue of Mrs. *Head* and *their* heirs. This word then, both in its natural and legal signification includes the whole generation, and means the same as "heirs of the body." If there be a devise to *A.* and *if he die without issue*, then over, *A.* takes an estate tail. So "for want of issue" will make an executory devise too remote. In *King v. Melling*, which has been cited, Lord *Hale*, though at first he thought with the rest of the Court that the first taker took only an estate for life, afterwards changed that opinion, and said that the party took an estate tail; and his opinion was afterwards established in error in the Exchequer Chamber (a). The reasoning of Lord *Hale* gives an answer to *Wyld's* case. He said "*issue*" is *nomen collectivum*, and takes in the whole generation *ex vi termini*; and so the case is stronger than if it were *children*." So in the stat. *de donis* (b) issue is equivalent to *heirs of the body*. So in 34 *Hen. 8.* of intails settled by the crown. And in another passage (c) he said "though the word children" may be made *nomen collectivum*, the word "*issue*" is *nomen collectivum* of itself. Many authorities are to be found to shew that "heirs of the body" and "issue" are words of limitation, although words of limitation be afterwards added. Of the former kind are *Goodright v. Pullyn*, 2 Lord Raym. 1437, and 2 Str. 729. *Morris v. Le Gay* cited in 2 Burr. 1102. *Goodright v. Herring*, E. 25 Geo. 3. B. R.; and *Wright v. Pearson*, Ambl. 359. of the latter are *Roe d. Dodson v. Grew*, 2 Wils. 322. and *King v. Burchall* (d), Ambl. 379.

The

(a) Vid: 2 Lev. 61.

(b) Westm. 2.

(c) Ventr. 231.

(d) The following note of this case was read by the defendant's counsel, as being a more correct note of it than any in print.

Michaelmas Term, 1759. In Chancery.

"William John King only son of Sarah King, niece of John Blount, plaintiff, Matthew Burchall, and Sarah his wife, Robert Hor-

ridge, and Mary his wife, defendants; Sarah and Mary being co-heiresses, and only children of John Harris, devisee in the last will of John Blount.

John Blount devised a messuage and farm in Hunton and Linton, in Kent, called Savage, unto his cousin John Harris, second son of Thomas Harris by the testator's sister, Sarah, To hold during his natural,



The case of *Backhouse v. Wells*, 1 *Eq. Cas. Abr.* 184. is not an exception to the rule laid down by Lord Henley, for *issue* is there

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natural life, and from and immediately after the determination of that estate unto the issue male of the body of his cousin John Harris lawfully to be begotten, and to his and their heirs, share and share alike, if more than one, and for want of such issue, unto the issue female of his cousin John Harris, and to her and their heirs, share and share alike, if more than one, and for want of such issue unto his cousin William King, son of his niece Sarah King, who was daughter of Thomas Harris, by Sarah his wife, his heirs and assigns for ever. And taking notice that he had covenanted to settle 50*l.* a year on his wife, in part performance, he devised houses, &c. in *Maidstone*, of the yearly value of 43*l.* to her, to hold for life, as part of her jointure, and from and immediately after her decease to his cousin *John Harris* for life, remainder to the issue male of the body of the said *John Harris*, and to his and their heirs, and for want of such issue to his cousin *William King* in fee. In the will is this conditional proviso, that the several bequests of all the messuages in *Lynton*, so devised to *John Harris* and his issue male and female, are or shall be on this special condition, that if he and his issue, or any or either of them, shall at any time hereafter alienate, mortgage, incumber, or otherwise commit any act, whereby to alter, change, charge, or defeat, the said bequests and limitations, then every person so alienating &c. shall pay or cause to be paid, and I do hereby charge all the said messuages with the payment of 2000*l.* for such person and his heirs, who ought next to take by virtue of the devises or bequests aforesaid. The testator died in 1738: and his wife *Elizabeth* in 1745. *John Harris* entered and enjoyed the premises till February 1758; but in *Trinity* term 1751 suffered a recovery; and then by deeds of lease and release settled the lands to different purposes than are mentioned in *J. Blount's* will; viz. to himself for life, remainder to *Sarah Burchall*, and *Mary Horridge*, his two daughters, their heirs and assigns for ever, as tenants in common. *John Harris* died in February 1758, without issue male, leaving only two daughters *Sarah Burchall* and *Mary Horridge*.

Lord Keeper HENLEY. The first question made by the plaintiff's counsel, was, whether *Harris* took under this will an estate for life only, or an estate tail. And they founded their argument for it's being an estate for life on the word *issue* being technically a word of purchase, and on the superadding words of limitation; and they compared this case to *Loddington* and *Kime*, amongst many other cases. The true answer is, that there can be no technical words in a will, but they are to be construed according to the intention of the parties. 2dly. This case has no resemblance to *Loddington* and *Kime*: that was expressly upon two contingencies, to *A.* for life, and if *A.* have issue, then to such issue in fee; and if he die without issue, then to *B.* in fee. There the court construed the word *issue* to be *nomen singulare*; and were well warranted in so doing by the intent of the party. But here it is and must be plural: and if the issue were to take as purchasers they must take as tenants in common. And put the case that *J. Harris* had ten sons, and the nine eldest died in his life time, leaving children, yet the tenth and only surviving son would in that case carry away the whole inheritance. 3dly. The testator intended the word *issue* to be a word of limitation in this case, and that *W. King* should take on failure of issue by *J. Harris* whenever that should happen, and has carried the whole fee in particular estates and remainders for want of such issue, *i. e.* for default of such issue. There is something of peculiar force in this expression, and the law supposes that the inheritance already attached in the first taker, but liable to be defeated by a subsequent event, his dying without issue; and by no rule of law can it admit of that narrow construction put on it by the plaintiff's counsel, viz. of being confined to issue living at *J. Harris's* death. They say that if it be construed to be an estate tail in *J. Harris*, the superadding words of limitation to the word *issue* must be rejected as nugatory. I agree it is a sound rule in construction of deeds and wills that every word ought to stand if consistent with the manifest intention. Therefore in *Backhouse* and *Wells* the limitation being to *A.* for life only, and after his decease to his

issue,



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there used in the *singular* number; as appears by a report of the same case in *Fort.* 133; and 10 *Mod.* 181. In *Loddington v. Kime* too, issue was used in the singular number. There is no case in which *issue* has not given an estate tail, where it is used in the plural. And in *Wright v. Pearson*, Lord Henley said, "it is true there are many cases where superaddition words have made the first words of limitation to be words of purchase; but all those cases are founded on *Archer's* case; and the first limitation has been to the heir, in the singular number, or the word each or every hath been used, so as to be descriptive of one individual person, who was to take." It is indeed added as a note to that case of *Wright v. Pearson*, that the opinion there delivered was dissatisfactory to the bar; but that objection is clearly removed by Lord Henley's judgment in *King v. Burchall*. Lord Raymond (a), commenting on *Archer's* case, said that it was determined on the ground that it was to the *next heir male*, in the singular number, and that otherwise it would have given an estate tail. *Wyld's* case is not applicable to the present; there the devise was "to R. Wyld and his wife, and after their decease to their children," he having two children at that time. There the devisor may be supposed to have devised in favor of those children: but here Mrs. Head had only one child when this will was made, and the devisor could not mean that child, for he has ad-

issue, if God should bless him with any; The Court first, on account of the negative word *only*, secondly because the word *issue* was so collected as to be construed *nomen singulare*, held it a word of purchase. So in *Shaw and Weigh*; and the words *heir* in *Maggott and Sewell*. But where there is an evident necessity to make it *plural*, there the same necessity requires that the superadded words of limitation should be rejected; and there is no case or authority to shew that the word *issue* or *heirs* when plural has been construed a word of purchase; but on the other hand there are authorities where the word *heir* in the singular number has been so; and so may the word *issue*, where the context requires it to be taken as a word of purchase. 4thly, The testator by the proviso in his will has plainly declared his intention to give J. Harris an estate tail "If J. Harris or any of his issue should alienate, &c."; how could J. Harris alienate, or incur, if he had no estate of inheritance. The case of *Wright*

and *Pearson* determined by me 7. 31 G. 2. has been attended to by the counsel in this case, and in my opinion that was a much stronger case than the present. That was of a trust estate, and there were trustees interposed to preserve, &c. and I was strongly pressed with the authority of *Bagshaw* and *Spencer*; yet after the best consideration I was able to give it, and after ransacking all the cases on the subject, I held it an estate tail; and as an appeal was brought to the House of Lords against that decree, but was afterwards deserted by the appellant, upon advising with his counsel; that determination, tho' a decree of my own, will have considerable weight with me; and I find upon viewing my notes in that case that the present has been argued upon the very same principles. I am therefore of opinion for the reasons before mentioned and from the authorities cited that *John Harris* took an estate tail male."



ded the words "and *their* heirs" after the words "the issue of Mrs. *Head*." It is true that in this case the words "for want of such issue" are not used: but though these words will of themselves give an estate-tail, the addition of them to a clause, in which issue is already used, will not enlarge that word. If it be a word of limitation in one part of the clause, it must have the same signification in another. It is also true that in this case there is no limitation over, which is to be found in some of the cases cited; but it does not appear that the Court relied upon it in those cases. With regard to the consequences of a contrary construction; if Mrs. *Head*'s children took as purchasers, to what time is the Court to look? Not to the time of making the will, because issue is used in the plural; nor to the death of the deviser, because that would exclude *Eleanor*, who was born afterwards; but when the estate is to vest, according to *Ellison v. Airay* (a). Then all the issue, whether children, or grandchildren &c. alive at Mrs. *Head*'s death would take equally, as tenants in common: if so, the estates to the issue were contingent, and, there being no trustees to preserve contingent remainders, they were destroyed by the destruction of the particular estate in Mrs. *Head*'s lifetime. At least it would take away the estate of one of the children, who was born after the death of the tenant for life. But, secondly, even supposing that Mrs. *Head* only took an estate for life, and her children took joint estates, the plaintiff cannot recover in this ejectment; because there is no joint demise by the children.

*Woodroffe*, after observing that the last point was not made at the trial, and that the parties came to the assizes prepared with the case drawn for the purpose of taking the opinion of the Court on the principal question, was stopped.

LORD KENYON, Ch. J. On the general question, the decision which we shall give will not disturb the authority of a single case that has been cited: but considering them altogether I think this position is to be collected from them, that in a will "issue" is either a word of purchase or of limitation, as will best answer the intention of the deviser, though in the case of a deed it is universally taken as a word of purchase. Now in this case there is no doubt about the intention of the deviser, who "devised all his real estate unto his wife for her life, and after her decease to his daughters *Eleanor and Susannah, to be equally divided between them, not as joint-tenants, but as tenants in common;*" and then he proceeds to shew how their issue should take, namely, "the one

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(a) 1 Vez. 144.



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COLLIS.

moiety to his daughter *Eleanor* and her heirs for ever, and the other moiety to his daughter *Susannah Head* for life, and after her decease to the issue of her body lawfully begotten and their heirs for ever." Then how will this general intention, so declared, be best answered by the sub-division between the issue of the two daughters. The first moiety is given to one daughter and her heirs for ever: The other to another daughter for life, then to her issue, and their heirs for ever. Now if the devise of the second moiety be construed to give an estate tail to that daughter, the deviser's estate will not be equally divided; for then the ultimate reversion of the second moiety will be again sub-divided between the heirs of the two daughters; and the first daughter and her heirs will take a moiety of this reversion over and above what they take under the devise of the first moiety of the whole. In some cases, such as *Doe d. Long v. Laming*, the words "heirs of the body," have been restrained in this way; and they always give way with greater difficulty than the word "issue." Therefore without disputing any of the cases cited, but, on the contrary, in conformity with them all, and relying upon them for the foundation of this judgment, namely, that the intention of the deviser must prevail, I am of opinion that the deviser in this case used issue as a word of purchase; and consequently that the children of *Susannah Head*, who, it is to be observed, were all in *esse* when the fine was levied, took a fee. But on the other point, which is merely a question of form, and which was not made below, I think the defendant ought not now to be permitted to take the objection.

ASHHURST, J. (a) and GROSE, J. concurred.

The Court appeared extremely averse to give judgment for the defendant on the formal objection, which was not taken below; and on a subsequent day they ordered

The *possea* to be delivered to the plaintiff.

(a) Absent Buller, J.

Tuesday,  
June 28th.

DOE on the Demise of Count DUROURE against  
JONES.

The son of  
an alien fa-  
ther and  
English  
mother, born  
out of the  
king's alle-

giance, cannot inherit to his mother in this country. When once the five years, allowed to an infant to make an entry for the purpose of avoiding a fine, begin, the time continues to run, notwithstanding any subsequent disability.

A Special verdict in this ejectment was found at the last *Surry* Assizes, in substance as follows.

*Lewis Henry Scipio de Grimoard de Beauvoir*, commonly called Count *Duroure*, is the only lawful issue of *Henrietta* countess

*Duroure*,

In vol. 2. of  
my Case Books  
p. 83.



*Duroure*, formerly *Henrietta Knight*, spinster; who, being a natural born subject of this kingdom, and within the ligeance of the king, in *October* 1761, quitted the kingdom, and in *May* following, being at *Brussels* in the *Austrian Netherlands*, married *Lewis Alexander de Grimoard de Beauvoir*, count *Duroure*, the father of *Henry Scipio*. *Lewis Alexander* was a natural born subject of the kingdom of *France*, and at the time of the marriage was within the ligeance, and in the military service, of the *French* king, who was then at war with the king of *Great Britain*. Before the above marriage took place the hon. *Hollis St. John*, being seised in fee of the estates in question, by will devised them to his sister *Henrietta Knight* for life, remainder to his niece the countess *Duroure*, then *Henrietta Knight*, for life, remainder to the heirs male of her body; and for want of such issue, to his (the devisor's) own right heirs for ever. The verdict then stated the deaths of the devisor, and of his sister; the entry and seisin of the mother of the lessor of the plaintiff, and her death in 1763, leaving *Lewis Alexander* her husband, who is still living, and *Henry Scipio* her son, her surviving. That the lessor of the plaintiff was born at *Marseilles* on the 26th *February* 1763; and that his mother was resident there until and at the time of his birth, with and by the consent and approbation of her husband, who then and from the time of his marriage, was a subject to, and within the ligeance of, the *French* king, and not within the ligeance of the king of *Great Britain*. That preliminary articles of peace between the said kingdoms were signed in *November* 1762, and such peace was finally ratified and confirmed in *February* 1763, and continued to subsist until and after the proclamation thereof at *London* and *Westminster*, in *March* in that year. That after the death of the countess *Duroure*, the right hon. *F.* late viscount *Bolingbroke*, as heir at law to the devisor, *Hollis St. John*, claiming title to the premises in question, entered and became seised thereof; and afterwards in *March* 1773, conveyed the same for a valuable consideration to the defendant in fee; by virtue whereof he entered, and became seised. That in *Trinity* term 1775, a *fine sur conuzance de droit come ceo &c.* was levied of the same between *C. Langlois* plaintiff and the defendant deforciant; and the last proclamation of that fine was in *Easter* term 1776. The lessor of the plaintiff, when the fine was levied and proclaimed, was an infant, but attained the age of 21 on the 26th of *February* 1784; he was then at large in *England*, and continued so to be until the 17th of *December* 1784, when he

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was arrested, and imprisoned for debt, and was kept and detained in prison continually from that time until the 16th of September 1789; and on the 17th day of that month he, claiming title to the premises in question, made an actual and personal entry thereon in due form of law, to avoid the fine, and ejected the defendant &c.

*Marryat* (a), for the plaintiff made two questions. First, on the statute 25 *Ed. 3. ft. 2*, whether the lessor of the plaintiff were entitled to recover, notwithstanding his father was an alien. 2d. Whether he were bound by the fine, being an infant at the time it was levied, and having been in prison shortly after he came of age, so that five years had not elapsed since he came of age free from the disability of imprisonment; and contended for the affirmative of the first, and the negative of the second. First, It is not necessary to contend that the plaintiff is entitled to all the privileges of a natural born subject; it is sufficient that he is entitled to inherit under the statute of *Ed. 3.* which was a declaratory, and not merely an enacting, law, and which ordains that "all children inheritors which from thenceforth should be born "without the ligeance of the king, whose *fathers and mothers* at "the time of their birth were and should be at the faith and "ligeance of the king of *England*, should have and enjoy the "same benefits and advantages to have and bear the inheritance "within the same ligeance as the other inheritors aforesaid, in "time to come; so always that the mothers of the said children "do pass the sea by the license and wills of their husbands." Now although the words of the statute are "father *and* mother," yet the construction has ever been in the disjunctive *or*; so that if either the father *or* mother be a natural born subject, the child is entitled to inherit to that one who was natural born. *Rex v. Eaton* (b); *Bacon v. Bacon* (c); 1 *Bac. Abr.* 77. 2 *Vin. Abr.* 171. and *Collingwood v. Pace* (d). And although Lord *Hale* in another part of his argument in the latter case seems to contradict that idea, yet the former opinion is corroborated by a note in *Hargr. Co. Lit.* 12. a. & b. taken from *Hale's MS.* wherein it is said "husband denizen takes wife an alien, or wife takes husband an alien, and they have issue; it seems the issue shall inherit to the father in the first case, to the mother in the second." And the seeming contradiction may be explained

(a) In last *Easter* term.

(b) *Lit. Rep.* 23, 29.

(c) *Cro. Car.* 601.

(d) 1 *Ventr.* 422.



by observing that though Lord *Hale* thought such issue aliens to some purposes, yet not so as to all, and particularly as to their inheritable capacity under the statute of *Ed. 3.* If it be objected that in those cases the husband was an *Englishman*, and the wife only an alien, and that there the issue are permitted to inherit on the ground that the wife being *sub potestate viri* they may both be said to be under the allegiance of the king: it may be answered that the construction of the statute has been general and in the disjunctive, without distinguishing between the two cases: and if such a distinction could prevail, there would have been no occasion to have introduced the words *and mother*, which have been construed *or mother*, into the statute. But at all events that observation which was adapted to the case before the court, would not apply to a case like the present, where the inheritance is not claimed from the alien father, but from the mother, who was a natural born subject. And nothing is claimed here through the father, except the legitimacy of the son. As to the subsequent statutes, which have been enacted on the subject of alienage, namely 7 *Ann. c. 5.* and 4 *Geo. 2. c. 21.*, which may be drawn in aid of the statute of *Ed. 3.* although the latter of them *viz.* 4 *Geo. 2.* points out a distinction between the children of natural born or alien fathers, it is sufficient to observe that those statutes were passed with a very different view from that of *Ed. 3.*, and are calculated to convey much more important privileges; such as are not contended for by the lessor of the plaintiff, and therefore do not conclude the question as to his inheritable capacity merely under the statute of *Ed. 3.* With respect to the fine, the question will turn on the second branch of the statute 4 *Hen. 7. c. 24.*; the first part of which enacts that all persons shall be bound by the fine as well privies as strangers, “except women covert [other than parties to the fine] *persons within the age of twenty-one years*, in prison, &c. saving to every person, except the parties thereto, their right, provided they prosecute it within five years. Now the lessor of the plaintiff cannot be bound by that clause, because he falls expressly within one of the exceptions, being an infant at the time of levying the fine. And all the cases in which it has been adjudged that, if the party be not within one or other of the exceptions at the time, no subsequent disability shall impede the progress of the fine against him, apply solely

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to the construction of this first branch of the clause, and do not conclude this question. Then the statute proceeds to enact concerning the time within which the persons included in the former exception shall make their claim: and it ordains that "all such persons as be covert *de baron* [not party to the fine], "and every person within age of twenty-one years, in prison, or "out of this land, or not of whole mind, at the time of the said "fine levied and ingrossed, and by this act afore except, having "any right, &c. shall take their said actions, &c. within five "years next after they come and be of age of 21 years, out of "prison, uncovert, within this land, and of whole mind" &c. Upon this clause the question arises; concerning which no express adjudication has ever been made, and therefore the Court are at liberty to put such a construction upon it as will best answer the intention of the Legislature: and under those words they will have to consider whether after the first disability be removed a second disability arising shall stop the progress of the fine during its continuance; in other words whether the Legislature did not intend that the parties included in this second branch should have five years clear from every disability there mentioned in which to prosecute their claim. This question was touched upon in *Stowel v. Lord Zouch* (a); but as there are contradictory *dicta* there by the judges, who were divided in their opinions, the question still remains undecided. There is however a passage in *Shep. Touch.* 30. from whence it should seem that the party is not bound by the fine, unless he have five entire years to make his claim free from any of the disabilities mentioned in the act, except where such disability is incurred by his own voluntary act; for, speaking of absence out of *England*, it says that if a party be in *England* at the time of the fine levied, and after go beyond seas, and suffer the five years after the proclamations to pass, in this case he shall have no longer time, *except he be sent in the king's service and by his commandment*. Which seems to mark a distinction between voluntary and involuntary disabilities, and supposes that in the latter instance the fine would not continue to run, although the party was in *England* when it first began to have its operation. Now imprisonment must be considered as equally involuntary with the case there put; and is so considered in *Plowden* 366. where it is said that taking husband or going beyond the seas

(a) *Plowd.* 366. & 375.



are voluntary acts, but insanity of mind and *imprisonment* are against the will of the party. Then what ought to be the construction of the Court so as best to answer the intention of the Legislature. In introducing these exceptions, they certainly intended that the parties labouring under the disabilities mentioned should have the full benefit of the indulgence given them. Every reason which operated for the exception in the first instance is equally urgent as to any subsequent disability. This act was intended to allow all such persons five years clear from any of the disabilities mentioned: the words imply as much; and as the act was restrictive of the right which such persons had before, it ought to be construed literally and strictly.

*Shepherd* (a), for the defendant, insisted, on the first ground, that the plaintiff was not entitled to recover under the 25 *Ed. 3.* whether the question were considered on the words of that statute, or on the authorities which have been decided upon it. The words themselves being in the copulative, "fathers *and* mothers," cannot be construed in the disjunctive. And in the cases which have been cited to prove the contrary the children claimed under natural born fathers though their mother were born aliens. But the principle upon which they professed to go, rather confirms, than weakens, the construction contended for by the defendant; because in order to bring the cases within the statute, the Court considered the mother as under the allegiance of our king. The language of one of the judges in *Cro. Car.* 602. is that "the wife was *sub potestate viri*, & *quasi under the allegiance of our king.*" And this principle is confirmed in *Bro. Abr. tit. "Denizen"* pl. 21. where it is said that if an *English* subject pass the seas and marry an alien, the wife is under the allegiance of our king. The passage in *Bac. Abr.* 77, that *and* may be read *or*, it not entitled to great weight in the decision of this case, because the authorities, from which the principle is deduced, do not warrant the position. And the opinion of Lord Ch. B. *Hale* in *Collingwood v. Pace* seems decisive of this question; for he said (b), "It is without question that if an *English* woman go beyond the seas and marry an alien, and have issue born beyond the seas, the issue are aliens, for the wife was *sub potestate viri.*" Dangerous consequences too would result from a contrary construction of the statute; for then if a feme sole, who inherited any great office of state, as that of Great Cham-

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(b) 1 *Ventr.* 422.



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berlain, married a foreigner, her issue, as aliens, might be acting hostilely against the state, which, as natural born subjects of this country, they would be bound to serve and protect. But even if the question had been doubtful on the construction of the 25 *Ed. 3.* alone, the subsequent statutes which have been passed though made *diverso intuitu* afford a strong legislative interpretation of the former act. By the 4 *Geo. 2. c. 21.* which was passed to explain part of the 7 *Ann. c. 5.*, after reciting that doubts had arisen on the construction of it, it is enacted that all children born out of the king's allegiance, whose *fathers* are natural born subjects, shall be deemed to be natural born subjects. This explains not only the stat. of *Ann.*, but the 25 *Ed. 3.* also; for it would have been absurd to have enacted that only the children of natural born fathers should be considered as natural born subjects, if the children of *English* mothers and foreign fathers are entitled to inherit lands in this country. If the first point be against the lessor of the plaintiff, and he never were entitled to take, it is unnecessary to consider the second; but on that point also the defendant is entitled to judgment. By the general clause 4 *Hen. 7. c. 24.* all mankind would have been barred by the fine, unless the saving clauses had been added: and the exception in favour of infancy is (with some others) allowed, "*so that they or their heirs take their said actions or their lawful entry, according to their right and title, within five years next after they come and be at their full age, out of prison, &c.*" But the saving operates only on condition that the party prosecute his right within five years after the disability is removed: here the disability of infancy was removed in *February 1784*, and the lessor of the plaintiff made no entry to avoid the fine till *September 1789*. The five years then began the instant he was of age, and continued to run notwithstanding the subsequent imprisonment. That, when the disability is removed, the time begins and continues to run is clear from the opinion of the majority of the judges in *Stowell v. Lord Zouch* (a) and from the decision of this Court in *Doe d. Griggs and another v. Shane* (b).

Marryat,

(a) *Plow. 355.*

(b) *M. 28 Geo. 3. B. R.* At the trial before Gould, J. the defendant set up a fine in order to bar the plaintiff's title. It appeared in evidence that the person under whom the lessors of the plaintiff claimed, and to bar whom the fine was set up, was of

sane mind when the fine was levied, but that he became insane about two years afterwards; and the question was, whether the time continued to run against him while he was in that state; for if it did not, the lessors of the plaintiff had made their entry in time. A verdict was taken for the plaintiff.



*Marryat*, in reply. The cases cited in support of the plaintiff's right under the 25 *Ed.* 3. did not proceed simply on the principle that the wife was *sub potestate viri*, and therefore under the allegiance of our king; but in the case in *Lit.* the Court gave it as one reason for their judgment that it was not necessary that both the father and mother should be natural born subjects; for that the words "father and mother" in the statute should be taken in the disjunctive "fathers or mothers."

(*Per* GROSE, J. But there is a note at the end of that case, p. 29. which shews that the Court never gave such an opinion.) But there seems to be considerable doubt about the authenticity of that note; for it is there stated that *Harvey*, J. doubted; whereas it appears by the report of the case in *Cro. Car.* that *Hobart* J. (a) must have been the person there alluded to, and not *Harvey*, J. And *Hale C. B.* adopted the case as law in *Collingwood v. Pace*. Neither was the reason given, that the wife was under the allegiance of our king, because *sub potestate viri*, true in this respect; for she was notwithstanding an alien, and still owed allegiance to her former sovereign, since no person can by a voluntary act, such as marriage, throw off their allegiance. With respect to the subsequent statutes, the answer has been already given to them: they have more extensive, and very different, objects in view from the 25 *Ed.* 3. On the second question; the cases cited are distinguishable from the present; for in those the question was whether persons claiming under him, whose right was to be first barred, came within the time allowed; and the words of the statute being positive, "and saving to all other persons such action, right, &c. as first shall grow, &c. so that they pursue their right or title within five years next after such right &c. to them accrued &c.;" the court may perhaps have felt themselves bound by those words: but in the present case the question is, whether the person, to whom the right first accrues shall not have full five years, free from every disability, in which to assert his title. And the present case forcibly points out what the construction of the act ought to be; for if the lessor

tiff, with liberty to the defendant to move to enter a nonsuit, in case the Court should be of opinion that the party was barred. *Erskine* was to have shewn cause against the rule for entering the nonsuit, but he said that the current of authorities, on looking into them, was so strong against him, that he would not pretend to argue the question. That though *Brown* and *Saunders* had said in *Plowd.* 366. that in such a case the fine

fine would not run, yet that all the authorities were the other way; and so was the determination even in that case in *Plowd.* The Court said he was right in giving up the point, for that it was too plain to be disputed. And they made the rule absolute.

(a) This case was in *Hil.* 2 *Car.* 1. but it appears in *Cro. Car.* 28. that Sir *Henry Hobart*, died in *Hilary* 1 *Car.* 1.

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of the plaintiff should be held to be bound by the fine, so far from having had the indulgence which the Legislature professed and intended to give, of five years to prosecute his right free from the disabilities mentioned in the act, he will scarcely have had as many months.

Lord KENYON, Ch. J. The two questions, which have been raised in this case, are certainly of great importance, though in my opinion of no difficulty. It is of importance that it should be known who are deemed natural born subjects, on account of the various rights to which they are entitled. It is also important to know how far the operation of the statute of fines extends, not only as it affects questions arising on that particular act, but also as it involves in it questions arising on a very beneficial system of statutes, the statutes of limitations: For if we were to suffer any innovation on the established construction of fines, it might also endanger the uniform construction of the other statutes of limitations, which are of the greatest importance, inasmuch as they are statutes of repose. But from the time when I first read this case down to the present moment, I have not seen any fair reason to doubt on either of these points. The character of a natural born subject, anterior to any of the statutes, was incidental to birth only; whatever were the situations of his parents, the being born within the allegiance of the king constituted a natural born subject. The first statute which was passed on this subject, and which was mentioned in the argument, is that of 25 Ed. 3. and by that it is enacted "that all children inheritors, which from henceforth shall be born without the ligeance of the king, *whose fathers and mothers* at the time of their birth be and shall be at the faith and ligeance of the king of *England*, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same ligeance, as the other inheritors aforesaid in time to come." And notwithstanding what has been said by the plaintiff's counsel, I cannot conceive that the Legislature in passing that act meant to stop short in conferring the right of inheritance merely on such children, but that they intended to confer on them all the rights of natural born subjects. If we were now called upon for the first time to put a construction on the words of this statute, I should not think that they ought to be extended further than the natural import of the words, but that in order to be intitled to the privileges and benefits of that act, the children must be born of natural born parents, both father *and* mother, within the faith and ligeance of the king. But it is said that passages are to be found



in several books of authority to prove that *and* is to be taken to be disjunctive, and that the words of the statute are satisfied if *either* the father *or* mother be a natural born subject; and that if the father be a natural born subject, the issue may inherit to him, and *vice versa*, in the case of the mother. But I do not find that explicitly stated any where but in *Bacon's Abridgement*, which refers to several authorities in the margin, but which taken together do not fairly make out that proposition: but even if they did, I should think that the opinion of Lord *Hale* in *Colingwood v. Pace*, in *Ventris*, would have shaken, and indeed overturned, them; and that opinion has always been deemed of great authority. But I do not think that we are driven to the necessity of opposing the opinion of Lord *Hale* to the other cases, and of deciding upon either; because, considering the series of acts of parliament which have been passed since that time, 7 *An. c. 5.* 10 *An. c. 5.* & 4 *Geo. 2. c. 21.* we are in possession of a parliamentary exposition of this law. The first of those was of very extensive consequences, because it extended the benefits of naturalization to all foreign protestants; which having created some ferment in the kingdom was repealed in part, by the 10 *An. c. 5.* reserving however that part of the act which respects the children of natural born subjects born out of the king's allegiance; and it was supposed that the privileges of naturalization were extended by these two acts to children born out of the king's allegiance, if *either* the father or mother were a natural born subject. This subject came again before the Legislature for their consideration in the reign of *George the Second*; when they passed the 4 *Geo. 2. c. 21.* which, without the authority of any decided case, has closed the question, as a parliamentary declaration of the law. That statute, after reciting that doubts had arisen upon the construction of the 7 *An.* declares and enacts that "all children born out of the ligeance of the crown of *Great Britain*, whose fathers are natural born subjects, shall be declared to be natural born subjects, &c." The consideration of this subject was also again taken up in parliament in 13 *Geo. 3. c. 21.* which extends the same privileges to grandchildren, but still confines them to the paternal line. Therefore upon the whole, without considering what would be the construction of the stat. 25 *Ed. 3.* taken by itself, or resorting to the authority of *Colingwood v. Pace*, as contradicting (if it do contradict) the other cases cited, but principally relying on the Legislative exposition of the law, I have no doubt but that the lessor of the plaintiff, who was born in foreign parts, and of a foreign father, does not derive inheritable blood in this

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kingdom. And this would be sufficient for the determination of this case.

But on the other question, which is of infinitely greater importance, inasmuch as it respects an infinitely greater number of cases, it is not fit that we should be silent, lest our silence should be deemed an acquiescence with the plaintiff's argument. I confess I never heard it doubted till the discussion of this case, whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. I am very clearly of opinion on the words of the statute of fines, on the uniform construction of all the statutes of limitations down to the present moment, and on the generally received opinion of the profession on the subject, that this question ought not now to be disturbed. It would be mischievous to refine, and to make nice distinctions between the cases of voluntary and involuntary disabilities; but in both cases when the disability is once removed, the time begins to run.

ASHHURST, J. I am clearly of opinion against the lessor of the plaintiff, on both points. By the circumstance of his being born out of the king's ligeance he is *prima facie* an alien: and if he have any inheritable blood, it must be under the 25 Ed. 3. Now if there had been no decision upon that act, I should have thought that no difficulty whatever could have been raised upon it, the words being so perfectly clear. It says that persons, whose *fathers and mothers* are within the king's allegiance, shall be entitled to inherit; and here it is expressly stated that the father of the lessor of the plaintiff was not of that description. There certainly is some confusion in the cases upon this subject: but it is to be observed that the authorities cited in *Bac. Abr.* do not warrant the proposition there laid down; and the case of *Collingwood v. Pace* is the other way. But the Legislative exposition of the statute puts the matter out of all doubt. On the other point I also concur with my Lord. Our decision is warranted by the uniform construction which has been put upon this statute; and a contrary determination would be productive of all those mischievous consequences which the different statutes of limitations intended to prevent. If the disability be once removed, the time must continue to run notwithstanding any subsequent disability either voluntary or involuntary; and even if there were any distinction between the two kinds of disability, the present is

against



against the plaintiff, for the imprisonment for debt was in consequence of his own voluntary act.

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GROSE, J. (a) As both these questions are of great importance, and as I have not the least doubt upon either, I think it right to declare my opinion upon them. The first point is clearly with the defendant upon the words of the 25 *Ed.* 3., upon the decided cases, and upon the parliamentary exposition of the other statutes, which were made in *pari materia*. Nothing can be more explicit than the words of the 25 *Ed.* 3. The natural and grammatical import of the words "fathers and mothers" is in the copulative, and not in the disjunctive. A great deal of observation too arises on the latter part of the clause, which says, "so always that the mothers of such children do pass the sea by the license and wills of their husbands," and shews that the statute was never meant to extend to a case like the present. But it is not necessary to resort to that part, for the other words are sufficiently clear. But cases have been cited to prove that the words in this statute may be taken in the disjunctive: Now, whatever my own opinion might be upon this point, if that proposition had been clearly established by the authorities, I should have held myself bound by them. But with respect to *Bacon* and *Bacon*, the ground there was, that the father was an *English* merchant, and the mother *sub potestate viri*, and therefore under the allegiance of our king: but not a syllable is there mentioned that "and" in the statute should be construed "or." It is true indeed that in the report in *Littleton* it is said, that many of the judges thought that it was to be taken in the disjunctive: But the note at the end of that case, which I referred to, satisfies my mind that the Court had no idea that the statute ought to be so construed. The authority of Lord *Hale* in *Ventris* is also clear and decisive; and that is the opinion of one of the most able lawyers that ever sat in *Westminster-Hall*. Besides this there is also the opinion of Mr. *J. Blackstone*, which is deserving of great attention; for in commenting upon this statute he says, that all children born abroad, provided *both* (which is printed in Italics) their parents were at the time of the birth in allegiance to the king, may inherit, &c." Then consider what has been the parliamentary exposition of the word *and*. By the *stat.* 11 & 12 *W.* 3. c. 6. which was passed to enable natural born subjects to inherit the estates of their ancestors, notwithstanding their parents were aliens," it is enacted that all

see, however, in *note*  
in *Ventris*  
427. & 428.

(a) Mr. Justice *Buller* was sitting for the Lord Chancellor.



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natural born subjects may inherit, &c, although the father *and* mother, or fathers *or* mothers, or other ancestors, &c, through whom they derive their title or pedigree, be born out of the king's allegiance. Now we must suppose that the Legislature, when they passed this statute, knew what was contained in the 25 *Ed.* 3; and if they had been of opinion that *and* in that act meant *or*, they would not have made a difference between the two words in this statute. I also entirely agree with the observations which have been already made by the Court on the statutes of *An.* and of *Geo.* 2. as farther illustrating this subject. I have as little doubt on the other point relative to the fine: The words of the statute are clear in themselves; and there is a passage in *Shep. Touchst.* 30. which is decisive of the question. It is there said, "if they be in *England* at the time of levying the fine, and after go beyond the seas, and suffer the five years after the proclamations to pass; in this case they shall have no longer time, *except they be sent in the king's service and by his commandment.*" But here I consider the lessor of the plaintiff as having brought this disability on himself.

Judgment for the defendant.

Thursday,  
June 30th.

COPPELL *against* SMITH.

A sum of money directed to be paid by *A.* to *B.* by the Master's *allocatur* cannot be attached in *A.*'s hands by process out of the sheriff's court in an action against *B.*

**S**HEPHERD shewed cause against a rule for an attachment against the plaintiff for non-payment of a sum of money pursuant to the Master's *allocatur*.

A judge's order had been made to tax the attorney's bill for the plaintiff on the latter's undertaking to pay what should appear to be due. The Master's *allocatur* amounted to 36 *l.* for non-payment of which this rule had been obtained. The cause shewn was that after the master's *allocatur* and before any demand made on the plaintiff by his attorney an attachment had issued out of the sheriff's court against the plaintiff, who lived in the city of *London*, in an action brought by a third person against the attorney, attaching this debt in the hands of the plaintiff as garnishee. And the question was, whether a debt of this sort could be attached by process out of the sheriff's court.

The Court (stopping *Lawes, contra,*) were clearly of opinion that it could not, for this was a judicial act; and *Buller J.* said, that



that it had even been held that money awarded under a rule of court could not be attached (a).

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Rule absolute.

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against  
SMITH.

(a) *Grant v. Hawding*. H. 7 Geo. 3. B. R.

This cause was referred by virtue of an order of *nisi prius* to an arbitrator, who awarded a certain sum of money to be paid by the defendant to the plaintiff on a certain day; and, at the day, some of the creditors of the plaintiff attached the debt in the defendant's hands, according to the custom of the city of London; and he paid the money to the creditors.—And now the question was, Whether the city process of attachment could issue, when the cause was, in fact, depending in this court; for the rule of *nisi prius* being made a rule of this court, it must be considered as a sum of money ordered to be paid by the court.

For the defendant, it was insisted, that if the plaintiff wished to prevent the defendant's paying the money on the attachment, he should have litigated it in the court of London, and not come upon the defendant now to pay him the money awarded, after he had really and *bonâ fide* paid it to the cre-

ditors of the plaintiff. The practice in the city is, that the creditor brings an action against the debtor, and then attaches the goods in the hands of the garnishee; and if the defendant will put in sufficient bail to secure the plaintiff, then the garnishee goes free: but the garnishee can do nothing himself; and unless the defendant defend him, judgment must go against him: And, therefore, this court will never suffer the defendant, below, to lie by at the time till the garnishee has been compelled by the city process to pay the money to the creditor, and then permit him to come here for an attachment for not paying the money to him.

Lord MANSFIELD, Ch. J. I think the proceedings in the city court are erroneous; and the defendant cannot be allowed any thing in respect of the sums paid upon the city process; but he must pay the whole to the plaintiff, without prejudice to his recovering the money back again from the persons to whom he has paid it.

BALL against DUNSTERVILLE and Another.

Thursday,  
June 30th.

THIS was an action on a bill of sale; and the declaration stated that by a certain bill of sale made by the defendants, sealed with the seal of one of them for and on behalf of himself and the other, and by the authority of the other &c. Plea, *Non est factum*. At the trial at the last Exeter Assizes before Perryn, B. it was proved that one of the defendants, in the presence of the other and by his authority, executed the instrument for them both, they being partners in this transaction; but there was but one seal, and it did not appear that he had put the seal twice upon the wax. It was objected on the part of the defendants that the instrument was not properly executed, for that they (not being a corporation) could not have a common seal; that the execution by one could not operate as an execution by both, even though they both consented; and that the authority given by one to the other to execute a deed should itself have been conferred by deed. The learned judge over-

If A. execute a deed for himself and his partner, by the authority of his partner and in his presence, it is a good execution, tho' only sealed once.



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against  
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VILLE and  
Another.

ruled the objection, and the plaintiff obtained a verdict; to set aside which a rule was obtained in the last term.

*Bearcroft* and *Lawrence*, Serjt. now shewed cause; and relied upon Lord *Lovelace's* case (a), where it was said that "if one of the officers of the forest put one seal to the rolls by assent of all the verderers, and other officers, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all." And they observed that this was a stronger case, because this instrument was executed by one defendant in the presence of the other. But even if it were necessary that the one who did execute should have affixed the seal twice to the wax in order to execute for himself and his partner, it did not appear negatively that it was not done in this case.

*Bower*, *Rooke*, Serjt. and *Gibbs*, *contra*, said that though the defendant, who executed the deed, might have executed for himself and his partner, by putting the seal on the same wax, yet that he should actually have executed it twice, first for the one and then for the other; whereas here, he had only executed and delivered it once, which could not be taken to be the execution of both. But

*The Court* were clearly of opinion that there was no ground for the objection; that no particular mode of delivery was necessary, for that it was sufficient if the party, executing a deed, treated it as his own. And they relied principally on this deed having been executed by one defendant for himself and the other in the presence of that other.

Rule discharged.

(a) Sir *W. Jones* 268.

Thursday,  
June 30th.

### HOCKIN against COOKE.

Proof that the defendant agreed to sell so many bushels of corn according to a particular measure will not support

an allegation in a declaration to sell so many bushels; because "bushels," without any other explanation means a bushel by statute measure.

THE declaration in this case alleged that, in consideration that the plaintiff at the defendant's request had undertaken to purchase of the defendant a large quantity, to wit, 400 bushels of oats, according to a certain sample thereof then and there produced by the defendant to the plaintiff, at and after the rate of 1s. 6d. per bushel thereof, the defendant under-

took





took to sell and deliver to the plaintiff &c; and then stated the breach for non-delivery. At the trial, on the general issue, at the last *Easter* Assizes before *Perry*, B. it was proved that the contract was for so many bushels, according to the *Hartland Quay* measure, which contains 8 1/2 gallons to the bushel; on which it was objected that the contract proved varied from that declared on, for that a bushel, without any other explanation, means a bushel by the *Winchester* measure; because the 12 *Hen.* 7. c. 5. enacts that a bushel shall contain 8 gallons; and it is enacted by the 22 *Car.* 2. c. 8. that no person shall sell corn by any other bushel than that called the *Winchester* measure, containing 8 gallons, under a penalty of 40s. The learned judge suffered the cause to proceed, reserving liberty to the defendant's counsel to move to enter a non-suit, in case the Court should be of opinion that the objection was well founded. The plaintiff obtained a verdict; and in the last term a rule was given to shew cause why the verdict should not be set aside, and a non-suit entered.

*Rooke*, Serjt, and *Gibbs*, now shewed cause; saying that the bushel mentioned in the declaration might be applied to a customary bushel in the country, as used in opposition to a statute bushel. In 6 *Co.* 67. a. the Court said "It was adjudged in Sir *John Bruyn's* case, in the beginning of the reign of Queen *Elizabeth*, that in a common recovery, which is had by agreement and consent of the parties, of acres of land, they shall be accounted according to the customary and usual measure of the country, and not according to the statute *de terris mensurandis*. 33 *Ed.* 1. So it is agreed in 47 *E.* 3. 18. a. that if a man bargain and sell so many acres of wood, it shall be measured according to the usage of the country, *sc.* according to 20 feet to the rod, and not according to the said act, for *consuetudo loci est observanda*." And yet it might have been contended in those cases that *acres*, without any farther explanation, must necessarily have meant statute acres. So by different statutes, *Mag. Chart.* c. 25. 14 *Ed.* 3. *st.* 1. c. 12; and 27 *Ed.* 3. c. 10. it is enacted that there shall be only one weight throughout the kingdom; and yet Lord *Coke* observes (a) that there are two weights, notwithstanding these statutes; and in his comment on *Mag. Chart.* says (b), "and this [speaking of there being only one weight and one measure] hath often by authority of parlia-

(a) 4 *Inst.* 273.(b) 2 *Inst.* 41.



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HOCKIN  
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COOKE.

ment been enacted but never could be effected." This case is extremely different from that of *Noble v. Durnell* (a), for that only decided that a custom to compel persons in a particular town to sell butter, of more than 16 ounces to the pound, was bad. But

*The Court* (stopping *Lawrence*, Serjt. and *Burrough*, who were to have argued in support of the rule) said that the question was not whether these parties might not have contracted for the sale of corn by a customary measure, differing from the statute measure, but whether there was not a variance between the contract proved and that alleged in the declaration. Of which they said no doubt could be entertained; for that a bushel, taken by itself, and without reference to any custom, or particular agreement, meant a statute bushel.

Rule absolute.

(a) *Ante* 3 vol. 271.Thursday,  
June 30th.BONAFOUS *against* SCHOOLE.

A person, in custody under an attachment for non-payment of costs, may be charged with an execution in a different action.

**B**EARCROFT obtained a rule to shew cause why the detainer against the prisoner should not be set aside, because when it was lodged against him he was in custody on an attachment for non-payment of costs, which was (it was said) a criminal proceeding. And it was contended that a plaintiff in a civil action could not change the custody of the defendant under a criminal charge without leave of the Court, or an order by one of the judges. *Fost.* 61. *Allgood v. Howard*, *Co. Pract.* 27. and *Pepper v. Bawden*, *ib.* 31.

*Bower* shewed cause on the general ground, and also on an affidavit, which stated that the defendant was in custody under civil process in another action when he was charged with the attachment. And, as to the general ground, he said that the authorities cited were not applicable to the present; those in *Co. Pract.* being cases where the defendant was charged with a declaration, whereas this was an execution. And as to the case in *Fost.* the party was attainted, and it was contended that such a person was *civiliter mortuus*; and there too the party was charged with leave of the Lord Chief Justice. But

*The Court* were clearly of opinion that the application could not be supported. That in the first place an answer in point of fact had been given to it, that the defendant was in custody in a civil suit at the time when he was charged with the



the attachment, And secondly, that the rule, on which the motion was grounded, did not apply to this case. The foundation of the rule is that a prisoner, who is in custody at the suit of the king, cannot be charged with civil process, without leave of the Court, or of one of the judges. But this defendant was only in custody on an attachment for non-payment of costs; which, in whatever light it may have been considered when the cases cited from *Co. Pract.* were determined, has of late years been deemed to be only a civil execution; so much so that a person charged in custody on such an attachment is entitled to be discharged under the lords' act (a). And they

Discharged the rule.

(a) *Cowp.* 136. See also *R. v. Myers*, *ante*, 1 vol. 266.

CHORLEY, M. D. *against* BOLCOT, Executor.

Thursday,  
June 30th.

THE plaintiff, who was a physician, living at *Doncaster*, brought this action for fees, for attending for a considerable time on the defendant's testator, who lived at some little distance from the town; and the evidence was that at *Doncaster* and its neighbourhood there was no certain rule about fees, but the general practice was for a physician to receive two guineas a week for his attendance. The plaintiff obtained a verdict at the last assizes at *York*; to set aside which

A physician  
cannot maintain an action for his fees.

*Wood* obtained a rule *nisi* last term, on the ground that no action lay for a physician's fees any more than for a barrister's.

*Cockell*, Serjt., and *Chambre*, now shewed cause; observing that though this point had been ruled several times at *nisi prius* against such a claim, yet it had never been solemnly decided; nor was there any authority in the books for putting the claim of a physician's fees upon the same footing as those of a barrister. In the latter case it might originally have been proper that no temptation should be held out to countenance injustice: but in the former it would be equally impolitic that those who are frequently put to expence in attending patients at a distance, and who are liable to make reparation to those who may suffer by their want of skill, should not be certain of a just and honourable reward. The regulation with regard to barristers is founded on grounds of public policy, as appears by the passage in *Tacitus*, to which Mr. J. *Blackstone* (a) refers; but they are totally inapplicable to the case of physicians. And in that very passage

(a) 3 *Bl. Com.* 28, 9.



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in *Tacitus* it is taken for granted that the latter were entitled to a remuneration, because their situation was dissimilar to that of advocates. Besides in this case there is an additional reason why the plaintiff should recover, as there is understood to be a general stipulated acknowledgment for a physician's attendance at the place where this transaction arose.

Lord KENYON, Ch. J. I remember a learned controversy some years ago as to what description of persons were intended by the *Medici* at Rome; and it seemed to have been clearly established by Dr. Mead, that by those were not meant physicians, but an inferior degree amongst the professors of that art, such as answer rather to the description of surgeons amongst us. But at all events it has been understood in this country that the fees of a physician are honorary, and not demandable of right. And it is much more for the credit and rank of that honorable body, and perhaps for their benefit also, that they should be so considered. It never was yet heard of that it was necessary to take a receipt upon such an occasion. And I much doubt whether they themselves would not altogether disclaim such a right as would place them upon a less respectable footing in society than that which they at present hold.

*Per Curiam*

Rule absolute.

Thursday,  
June 30th.

## CHEETHAM against HAMPSON.

An action on the case for not repairing fences, whereby another party is damaged, can only be maintained against the occupier, and not against the owner of the fee who is not in possession.

THIS was an action on the case against the defendant, who was owner of the fee, for not repairing the fences of a close, whereby the plaintiff was damaged, &c. At the trial before Thomson, B. at the last assizes for Lancaster, it appeared that another person was tenant in possession under the defendant; whereupon it was objected that the action did not lie against the present defendant. The learned judge would not non-suit the plaintiff, and a verdict was taken for him; but he gave leave to the defendant's counsel to move the Court to set that verdict aside and to enter a non-suit, if they should be of opinion that the objection was well founded. A rule *nisi* having been obtained for that purpose last term,

Law now shewed cause against it; contending that from all the old authorities it appeared that the burthen of repair lay upon the owner of the fee; and that the cases which shew that the occupier also is liable only prove that the same burthen may



may be extended to him, but do not shew that the party injured by the neglect to repair may not elect to take his remedy against either. Nor is any hardship thereby imposed upon the owner; for if by his agreement with his tenant he has reserved to himself the burthen of repairing, it is but just that he should suffer for his own neglect; and if he has not, he has his remedy over against his tenant, who must be better known to him than to a stranger. The first instance to be found of an action of this kind brought against the occupier is that of *Star* against *Rookeby* (a), where the prescription was that the *tenants and occupiers* of the close had repaired, &c. There the Court said, "that by the word *tenentes*, which is construed tenants, is meant the owners of the fee-simple, and by occupatores those who come in under them; and that it is sufficient [which rebuts the idea of its being necessary] for the plaintiff to charge the *tenentes et occupatores*, because it is impossible that he who is a stranger should be able to know and set forth their particular estates, &c.:" but say they "the prescription is annexed to the *tenentes*, i. e. tenants of the fee". And in *Rosewell v. Prior* (b) an action on the case was maintained against the owner, who was not in possession, for a nuisance in making an erection which stopped ancient lights; and the Court held that the action lay either against him or the tenant in possession, at the plaintiff's election. Again in *Holback v. Warner* (c) two judges against one held the declaration in an action on the case for not repairing to be bad, because the prescription laid was that *omnes possessores* of such a close were bound to repair, &c.; and the very objection was because the prescription ought to have been laid in a tenant of the freehold, or in him who had the inheritance; for that *terrarum tenentes* in the old entries mean the owners of the fee. And the common form of declaring is against the *tenants and occupiers*.

*Cockell*, Serjt. *contra*, was stopped by the Court.

LORD KENYON, Ch. J. It is clear that this action cannot be supported against the owner of the inheritance, when it is in the possession of another person. It is so notoriously the duty of the actual occupier to repair the fences, and so little the duty of the landlord, that, without any agreement to that effect, the landlord may maintain an action against his tenant for not so doing, upon the ground of the injury done to the inheritance. And deplorable indeed would be the situation of landlords, if they were liable to be harraressed with actions for the culpable neglect of their tenants.

(a) *Salk.* 335.

(b) *Salk.* 460.

(c) *Cro. Jac.* 665.

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ASHHURST, J. declared himself of the same opinion.  
BULLER, J. With respect to the case of *Roswell v. Prior*, which is the only one cited of an action of a similar nature maintained against the owner out of possession, it is very distinguishable from the present; for there the owner let the premises with the nuisance complained of, which had been before erected upon them. That therefore was a misfeazance of which he himself had been guilty; and, say the Court, his demise affirmed the continuance of the nuisance, and therefore might be said to be a continuation of it by himself. And whatever construction the word *tenentes* may bear in the old entries in real actions, that will not affect the present question, which arises on a possessory action on the case against a *wrong-doer*; and the simple question is whether the landlord can in any sense be called a wrong-doer, because of the neglect of his tenant to repair. The instances of such actions as the present against owners are where the *tenentes* and *occupatores* were the same; but the action lies against them only in the latter capacity.

Rule absolute (a).

(a) *Vide 2 Ld. Raym.* 804. *Noy* 93. *Latch.* 206. and *Rider v. Smith*, ante 3 vol. 766.

Friday,  
July 1st.

MASTER and Others against MILLER.

An alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration.

137 3 judges  
27 1 Buller

THE first count in this declaration was in the usual form by the indorsee of a bill of exchange against the acceptor; it stated that *Peel and Co.* on the 20th of *March* 1788 drew a bill for 974*l.* 10*s.* on the defendant, payable three months after date to *Wilkinson and Cooke*, who indorsed to the plaintiffs. The second count stated the bill to have been drawn on the 26th of *March*. There were also four other counts, for money paid laid out and expended; money lent and advanced; money had and received; and on an account stated. The defendant pleaded the general issue; on the trial of which a special verdict was found.

It stated that *Peel and Co.* on the 26th *March* 1788 drew their bill on the defendant, payable 13 months after date to *Wilkinson and Cooke*, for 974*l.* 10*s.*; "Which said bill of exchange, made by the said *Peel and Co.*, as the same hath been altered, accepted, and written upon, as hereafter mentioned, is now produced, and read in evidence to the said jurors, and is now expressed in the words



words and figures following, to wit; "*June 23d. 974l. 10s. Manchester, March 26, 1788, Three months after date pay to the order of Messrs Wilkinson and Cooke 974l. 10s. received, as advised, Peel, Yates, and Co. To Mr. Chas. Miller. C. M. 23d June 1788.*" That *Peel* and *Co.* delivered the said bill to *Wilkinson* and *Cooke*, which the defendant afterwards, and before the alteration of the bill hereinafter mentioned, accepted. That *Wilkinson* and *Cooke* afterwards indorsed the said bill to the plaintiffs, for a valuable consideration before that time given and paid by them to *Wilkinson* and *Cooke* for the same. That the said bill of exchange at the time of making thereof, and at the time of the acceptance, and when it came to the hands of *Wilkinson* and *Cooke* as aforesaid, bore date on the 26th day of *March 1788*, the day of making the same. And that after it so came to, and whilst it remained in the hands of, *Wilkinson* and *Cooke*, the said date of the said bill, without the authority, or privity, of the defendant, was altered by some person or persons to the jurors aforesaid unknown from the 26th day of *March 1788*, to the 20th day of *March 1788*. That the words "*June 23d.*" at the top of the bill were there inserted to mark that it would become due and payable on the 23d of *June* next after the date; and that the alteration herein before mentioned, and the blot upon the date of the bill of exchange, now produced and read in evidence, were on the bill of exchange, when it was carried to and came into the hands and possession of the plaintiffs. That the bill of exchange was on the 23d of *June* and also on the 28th of *June 1788* presented to the defendant for payment; on each of which days respectively he refused to pay. The verdict also stated that the bill so produced to the jury and read in evidence was the same bill, upon which the plaintiffs declared &c.

This case was argued in *Hilary* term last by *Wood* for the plaintiffs, and *Mingay* for the defendant: and again on this day by *Chambre* for the plaintiffs, and *Erskine* for the defendant.

For the plaintiffs it was contended that they were entitled, notwithstanding the alteration in the bill of exchange, to recover according to the truth of the case, which is set forth in the second count of the declaration, namely, upon a bill dated the 26th *March*; which the special verdict finds was in point of fact accepted by the defendant. More especially as it is clear that the plaintiffs are holders for a valuable consideration,

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and had no concern whatever in the fraud that was meditated, supposing any such appeared. The only ground of objection which can be suggested is upon the rule of law relative to deeds, by which they are absolutely avoided, if altered even by a stranger in any material part; and upon a supposed analogy between those instruments and bills of exchange. But upon investigating the grounds on which the rule stands as applied to deeds, it will be found altogether inapplicable to bills: and, if that be shewn, the objection founded on the supposed analogy between them must fall with it. The general rule respecting deeds is laid down in *Pigot's case* (a), where most of the authorities are collected; from thence it appears, that if a deed be altered in a material point even by a stranger without the privity of the obligee, it is thereby avoided; and if the alteration be made by the obligee, or with his privity, even in an immaterial part, it will also avoid the deed. Now that is confined merely to the case of deeds, and does not in the terms or principle of it apply to any other instruments not executed with the same solemnity. There are many forms requisite to the validity of a deed, which were originally of great importance to mark the solemnity and notoriety of the transaction; and on that account the grantees always were, and still are, entitled to many privileges over the holders of other instruments. It was therefore reasonable enough that the party, in whose possession it was lodged, should on account of its superior authenticity be bound to preserve it entire with the strictest attention, and at the peril of losing the benefit of it in the case of any material alteration even by a stranger. And that he is the better enabled to do from the nature of the instrument itself, which not being of a negotiable nature is not likely to meet with any mutilation, unless through the fraud or negligence of the owner; whereas bills of exchange are negotiable instruments, and are perpetually liable to accidents in the course of changing hands, from the inadvertence of those by whom they are negotiated, without any possibility of their being discovered by innocent indorseees, who are ignorant of the form in which they were originally drawn or accepted. And the present is a strong instance of that; for the plaintiffs cannot be said to be guilty of negligence in not enquiring how the blot came on the bill, which mere accident might have occasioned. That the same reasons, upon which the decisions of the Courts upon deeds have been grounded, will not support such judgments upon bills,

(a) 11 Co. 27.

will



will best appear by referring to the authorities themselves. When a deed is pleaded, there must be a *profert in curiam*, unless as in *Reed v. Brookman* (a) it be lost or destroyed by accident, which must however be stated in the pleadings. The reason of which is, that anciently the deed was actually brought into Court for the purpose of inspection; and if, as is said in 10 Co. 92. b. the judges found that it had been razed or interlined in any material part, they adjudged it to be void. Now as that was the reason why a deed was required to be pleaded with a *profert*, and as it never was necessary to make a *profert* of a bill of exchange in pleading, it furnishes a strong argument that the reason applied solely to the case of deeds. So deeds, in which were erasures, were held void, because they appeared on the face of them to be *suspicious*. 13 Vin. Abr. tit. *Faits* 37, 38. Bro. Abr. *Faits* pl. 11. referring to 44 Ed. 3. 42. Nor could the supposition of fraud have been the ground on which that rule was founded with respect to deeds; for in *Moor* 35. pl. 116. a deed which had been razed was held void, although the party himself who made it had made the erasure: which was permitting a party to avail himself of his own fraud. But it is impossible to contend that the rule can be carried to the same extent as to bills; nor is it denied but that if the blot here had been made by the acceptor himself, he would still have been bound. In *Keilw.* 162. it is said that if *A.* be bound to *B.* in 20*l.*, and *B.* raze out 10*l.*, all the bond is void, although it is for the advantage of the obligor, and even where an alteration in a deed was made by the consent of both the parties, still it was held to avoid it. 2 Rol. Abr. 29. letter U pl. 5. [Lord Kenyon observed that there had been decisions to the contrary since.] Fraud could not be the principle on which those cases were determined; whereas it is the only principle on which the rule contended for can be held to extend to bills of exchange, but which is rebutted in the present case by the facts found in the special verdict. According to the same strictness, where a mere mistake was corrected in a deed, and not known by whom, it was held to avoid it. 2 Roll. Abr. 29. pl. 6. And it does not abate the force of the argument, that the law is relaxed in these respects even as to deeds, for the question still remains, whether at any time bills of exchange were construed with the same rigor as deeds. The principle

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(a) *Ante* 3 vol. 151.

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upon which all these cases relative to deeds was founded was, that nothing could work any alteration in a deed, except another deed of equal authenticity. And as the party, who had possession of the deed, was bound to keep it securely, it might well be presumed that any material alteration even by a stranger was with his connivance, or at least through his culpable neglect. In many of the cases upon the alteration of deeds, the form of the issue has weighed with the Court; as in 1 *Rol. Rep.* 40. [which is also cited in *Pigot's case*, 11 *Co.* 27.] and *Michael against Stockwith*, *Cro. El.* 120; in both which cases the alteration was after plea pleaded; and on that ground the Court held it was still to be considered as the deed of the party on *non est factum*. Now the form of the issue in actions upon deeds and those upon bills is very different; in the one case, the issue simply is, whether it is the deed of the party, which goes to the time of the plea pleaded, as appears from the case before cited, and from 5 *Co.* 119. *b.* and *Dy.* 59: but here the issue is whether the defendant promised at the time of the acceptance to pay the contents. The form of the issue is upon his promise, arising by implication of law from the act of acceptance, which is found as a fact by the special verdict agreeable to the bill declared on in the second count. And in no instance, where an agreement is proved merely as evidence of a promise, is the party precluded from shewing the truth of the case. Not only therefore the forms of pleading are different in the two cases, but the decisions which have been made upon deeds, from whence the rule contended for as to erasures and alterations is extracted, are altogether inapplicable to bills. The reasons for such rigorous strictness in the one case do not exist in the other. On the contrary all the cases upon bills have proceeded upon the most liberal and equitable principles with respect to innocent holders for a valuable consideration. The case of *Minett and Gibson* (a) goes much further than the present: for there this Court, and afterwards the House of Lords, held that it was competent to inquire into circumstances extraneous to the bill, in order to arrive at the truth of the transaction between the parties; although such circumstances operated to establish a different contract from that which appeared upon the face of the bill itself. Whereas the evidence given in this case, and the facts found by the special verdict, are in order to shew what the bill really was; which it is competent for these parties to do against whom no

(a) *Ante* 3 vol. 481. in *B. R.* and 1 *H. Bl.* 569. in *Dem. Proc.*

fraud



fraud can be imputed, if any exist. If the blot had fallen on the paper by mere accident, it cannot be pretended that it would have avoided the bill; and *non constat* upon this finding that it did not so happen. Even if felony were committed by a third person, through whose hands the bill passed, although that party could not recover upon it himself, yet his crime shall not affect an innocent party, to whom the bill is indorsed or delivered for a valuable consideration. In *Miller v. Race* (a), where a bank note had been stolen, and afterwards passed *bonâ fide* to the plaintiff, it was held that he might recover it in *trover* against the person who had stopped it for the real owner. And the same point was held in *Peacock v. Rhodes* (b), where the bill was payable to order. Again in *Price v. Neale* (c), it was held that an acceptor, who had paid a forged bill to an innocent indorsee, could not recover back the money from him. Now if it be no answer to an action upon a bill against the acceptor to shew that it was a forgery in its original making by a third person's having feigned the hand-writing of the drawer, still less ought any subsequent attempt at forgery, even if that had been found which is not, to weigh against an innocent holder. But it would have been impossible to have recovered in any of these cases if the deed had been forged in any respect even by strangers to it; which shews that these several instruments cannot be governed by the same rules. And so little have the forms of bills of exchange and notes been observed, when put in opposition to the truth of the transaction, that in *Russell v. Langstaffe* (d) the Court held, in order to get at the justice of the case, that a person, who had indorsed his name on blank checks which he had entrusted to another, was liable to an indorsee for the sums for which the notes were afterwards drawn; and yet the form of pleading supposes the note to have been a perfect instrument, and drawn, before the indorsement. But the case which is most immediately in point to the present is that of *Price v. Shute*, *E. 33 Car. 2. in B. R.* (e); there a bill was drawn payable the first of *January*; the person upon whom it was drawn accepted it to be paid the first of *March*; the holder upon the bill's being brought back to him, perceiving this enlarged acceptance, struck out the first of *March*, and put in the first of *January*; and then sent the bill to be paid, which the acceptor refused. Whereupon

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(a) 1 Burr. 452.

(b) Dougl. 633.

(c) 3 Burr. 1354.

(d) Dougl. 514.

(e) 2 Moll. c. 10. s. 28.



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the payee struck out the first of *January*, and put in the first of *March* again. And in an action brought on this bill the question was, whether these alterations did not destroy it? And it was ruled they did not. This case therefore has settled the doubt; and having never been impeached, but on the contrary recognized as far as general opinion goes, by having been inserted in every subsequent treatise upon the subject, it seems to have been acted on ever since. And it would be highly mischievous if the law were otherwise; for however negligent the owner of a deed may be supposed to be, who lets it out of his possession, the holder of a bill of exchange is by the ordinary course of such transactions obliged to trust it even in the hands of those whose interest it is to avail themselves of this sort of objection. For it is most usual for the bill to be left for acceptance, and afterwards for payment, in the hands of the acceptor, who may be tempted to put such a blot on the date as may not be observed at the time, through the confidence of the parties. But even if the alteration should be considered as having destroyed the bill, why may not evidence be given of its contents upon the same principle as governed the case of *Read v. Brookman* (a), where it was held that pleading that a deed is lost by time and accident supercedes the necessity of a profert. But at any rate the plaintiffs are entitled to recover on the general counts for money paid, and money had and received, on the authority of *Tatlock v. Harris* (b); for though it is not expressly stated that so much money was received by the defendant, yet that is a necessary inference from the fact of acceptance which is found.

For the defendant it was contended, that the broad principle of law was, that any alteration of a written instrument in a material part thereof avoided such instrument; and that the rule was not merely confined to deeds, though it happened that the illustration of it was to be found among the old cases upon deeds only, because formerly most written undertakings and obligations were in that form. This principle of law was founded in sound sense; it was calculated to prevent fraud, and deter men from tampering with written securities: and it would be directly repugnant to the policy of such a law to permit the holder of a bill to attempt a fraud of this kind with impunity; which would be the case, if, after being detected in the attempt, he were not to be in a worse situation than he was before. If any difference were to be made between bills of exchange and deeds, it should rather be to en-

(a) *Ante* 3 vol. 151.(b) *Ante* 3 vol. 174.



force the rule with greater strictness as to the former; for it would be strange that, because they were more open to fraud from the circumstance of passing through many hands, the law should relax and open a wider door to it than in the case of deeds, where fraud was not so likely to be practised. The principle laid down in *Pigot's case* (a) is not disputed, as applied to deeds. But the first answer attempted to be given is, that the rule as to deeds is *sui generis*, and does not extend to other instruments of an inferior nature, because it arises from the solemn sanction attending the execution of instruments under seal. As to this it is sufficient to say that no such reason is suggested in any of the books: but the rule stands upon the broad ground of policy, which applies at least as strongly to bills as to deeds, for the reason above given. Then it is said that there is a material distinction between the several issues in the two cases. But the difference is more in words than in sense; the substance of the issue in both cases is, whether in point of law the party be liable to answer upon the instrument declared on; and therefore any matter which either avoids it *ab initio*, or goes in discharge of it, may be shewn as much in the one case as in the other. Upon *non est factum* the question is, whether in law the deed produced in evidence be the deed of the party; so on *non assumpsit* the question is, whether the bill given in evidence be in point of law the bill accepted by the defendant; because the promise only arises by implication of law upon proof of the acceptance of the identical bill accepted, and given in evidence. Now neither of the counts in the declaration was proved by the facts found. For in the first count the bill is dated the 20th of *March*; but as there is no evidence of the defendant's having accepted such a bill, of course the plaintiffs are not entitled to recover on that count. Neither can they recover on the 2d.; because though it is found that he accepted a bill dated the 26th of *March*, as there stated, yet inasmuch as the bill stated to have been produced in evidence to the jury is dated the 20th, of course the evidence did not support the count. With respect to the cases cited of bills of exchange having been always construed by the most liberal principles, and particularly in the case of *Minet v. Gibson*, the same answer may be given to all of them, which is, that so far from the original contracts having been attempted to be altered, all those actions were brought in order to enforce the observance of them in their genuine meaning against the party, who,

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in the latter case particularly, endeavoured by a trick to evade the contract. Whereas here the contract has been substantially altered by the parties who endeavour to enforce it; or at least by those whom they represent, and from whom they derive title. Then the case in *Molloy of Price v. Skute* is chiefly relied on by the plaintiffs, to which several answers may be given. First, the authenticity of it may be questioned; for it is not to be found in any reports, although there are several contemporaneous reporters of that period. In the next place, the bill as originally drawn was not altered upon the face of it; and therefore, as against all other persons at least than the acceptor, it might still be enforced. But principally it does not appear but that the action was brought against the drawer, who, as the acceptor had not accepted it according to the tenor of the bill, was clearly liable; as the payee was not bound to abide by the enlarged acceptance, but might consider it as no acceptance at all. Then if this bill be void for this fraud, no evidence could be given to prove its contents as in the case of a deed lost; because in that there is no fraud. But even if any other evidence might have been given, it is sufficient to say that in this case there was none. And as to the common counts; if the general principle of law contended for applies to bills of exchange, it will prevent the plaintiffs from recovering in any other shape. Besides which, it is not stated that the defendant has received any consideration, upon which ground the case of *Tatlock v. Harris* was decided.

In reply, it was urged that the issue was not whether the defendant had accepted this bill in the state in which it was shewn to the jury; but whether he had promised to pay in consequence of having accepted a bill dated the 26th *March*, drawn by &c; and those facts being found, the promise necessarily arises. It is said that the policy of the law will extend the same rule to the avoidance of bills of exchange which have been altered, as to deeds; because there is even greater reason to guard against fraudulent alterations in the former than in the latter case. To which it may be answered that the foundation of the rule fails in this case; for no fraud is found, and none can be presumed: and it is admitted that if the blot had been made by accident, it would not have avoided the bill; and nothing is stated to shew that it was not done by accident. Besides, the policy of the law is equally urgent in favor of the plaintiffs; it being equally politic to compel a performance of honest engagements. Here the defendant is only required to do that which in fact and in law he has promised to do.



do. And if he be not liable on this contract, he will be protected in with-holding payment of that money which he has received, and which by the nature of his engagement he undertook to repay. No answer has been given to the case cited from *Molloy*: for though the case is not reported in any other book, it bears every mark of authenticity, by noting the names of the parties, the Court in which it was determined, and the time of the decision; and it has been adopted by subsequent writers on the same subject. Again, the alteration there was full as important as this, for it equally tended to accelerate the day of payment; and lastly, it is not denied but that the action might have been maintained on the bill against any other person than the acceptor; which is an admission that the policy of the law does not attach so as to avoid such instruments upon any alteration, for otherwise it would have avoided the bill against all parties.

Lord KENYON, Ch. J. The question is not whether or not another action may not be framed to give the plaintiffs some remedy, but whether this action can be sustained by these parties on this instrument. For the instrument is the only mean by which they can derive a right of action. The right of action, which subsisted in favor of *Wilkinson* and *Cooke*, could not be transferred to the plaintiffs in any other mode than this, inasmuch as a *chose in action* is not assignable at law. No case, it is true, has been cited either on one side or the other, except that in *Molloy*, of which I shall take notice hereafter, that decides the question before us in the identical case of a bill of exchange. But cases and principles have been cited at the bar, which in point of law as well as policy ought to be applied to this case. That the alteration in this instrument would have avoided it, if it had been a deed, no person can doubt. And why in point of policy, would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected. At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanor: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for committing such an offence was compounded of those two circumstances, the punishment for the misdemeanor, and the avoidance of the deed. And though the punishment has been since increased, the principle still remains the same. I lay out of my consideration all the cases, where the alteration was made

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by accident. For here it is stated that this alteration was made while the bill was in the possession of *Wilkinson* and *Cooke*, who were then entitled to the amount of it; and from whom the plaintiffs derive title: and it was for their advantage (whether more or less is immaterial here) to accelerate the day of payment, which in this commercial country is of the utmost importance. The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions, which were indeed confined to deeds, applied to the then state of affairs: but they establish this principle, that all *written instruments*, which were altered or erased, should be thereby avoided. Then let us see whether the policy of the law, and some later cases, do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout *Europe*, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened. It was doubted so lately as in the reign of *George the First* (a), in *Ward's* case, whether forgery could be committed in any instrument less than a deed, or other instrument of the like authentic nature; and it might equally have been decided there that, as none of the preceding determinations extended to that case, the policy of the law should not be extended to it. But it was there held that the principle extended to other instruments as well as to deeds; and that the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. The case cited from *Molloy* indeed at first made a different impression on my mind: but on looking over it with great attention, I think it is not applicable to this case. No alteration was there made on the bill itself; but the party, to whom it was directed, accepted it as payable at a different time, and afterwards the payee struck out the enlarged acceptance; and, on the acceptor refusing to pay, it is said that an action was maintained on the bill. But it does not say against whom the action was brought; and it could not have been brought against the acceptor, whose acceptance was struck out by the party himself who brought the action. Taking that case in the words of it "that the alterations did not destroy the bill", it does not affect this case: not an iota of the bill itself was altered; but on the person, to whom the bill was directed, refusing to accept the bill as it was originally

(a) 2 *Sir.* 747. and 2 *Lord Raym.* 1461.

drawn,



drawn, the holder resorted to the drawer. Then it was contended that no fraud was intended in this case; at least that none is found: but I think that, if it had been done by accident, that should have been found, to excuse the party, as in one of the cases, where the seal of the deed was torn off by an infant. With respect to the argument drawn from the form of the plea, it goes the length of saying that a defendant is liable, on *non-assumpsit*, if at any time he has made a promise, notwithstanding a subsequent payment: but the question is whether or not the defendant promised in the form stated in the declaration; and the substance of that plea is that according to that form he is not bound by law to pay. On the whole therefore, I am of opinion that this falsification of the instrument has avoided it; and that, whatever other remedy the plaintiffs may have, they cannot recover on this bill of exchange.

ASHHURST, J. It seems admitted that, if this had been a deed, the alteration would have vitiated it. Now I cannot see any reason why the principle, on which a deed would have been avoided, should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment, or in wax. And a bill of exchange, though not a deed, is evidence of a contract, as much as a deed; and the principle to be extracted from the cases cited is that any alteration avoids the contract. If indeed the plaintiffs, who are innocent holders of this bill, have been defrauded of their money, they may recover it back in another form of action: but I think they cannot recover upon this instrument, which I consider to be a nullity. It is found by the verdict that the alteration was made while the bill was in the possession of *Wilkinson* and *Cooke*; and it certainly was for their advantage, because it accelerated the day of payment. Now, upon these facts, the jury would perhaps have been warranted in finding that the alteration was made by them; at all events it was their business to preserve the bill without any alteration. If *Wilkinson* and *Cooke* had brought this action, they clearly could not have recovered, because they must suffer for any alteration of the bill while it was in their custody: then if the objection would have prevailed in an action brought by them, it must also hold with regard to the plaintiffs, who derive title under them. For wherever a party takes a bill under such suspicious circumstances appearing on the face of it, it is his duty

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to enquire how the alteration was made; he takes it at his risk, and must take it subject to the same objection as lay against the party from whom he received it. Upon the whole, there seems to be no difference between deeds and bills of exchange in this respect in favour of the latter: but, on the contrary, if there be any difference, the objection ought to prevail with greater force in the latter than in the former; for it is more particularly necessary that bills of exchange, which are daily circulated from hand to hand should be preserved with greater purity than deeds, which do not pass in circulation. It would be extremely dangerous to permit the party to recover on a bill as it was originally drawn, after an attempt to commit a fraud, by accelerating the time of payment. For these reasons, therefore, I concur in opinion with my Lord.

BULLER, J. In a case circumstanced as the present is, in which it is apparent, as found, and has been proved beyond all doubt, that the bill of exchange in question was given for a full and valuable consideration, that the plaintiffs are honest and innocent holders of it, and that the defendant has the amount of the bill in his hands, it is astonishing to me that a jury of merchants should hesitate a moment in finding a verdict generally for the plaintiffs, more especially as I understand it was left to them by the chief justice to read the bill as it undoubtedly was drawn, and by that mean to put an end to the question at once. It was rightly so left to the jury by his Lordship; for that was in furtherance of the justice of the case, and it tended to prevent expence, litigation, and delay, which are death to trade. That the defendant cannot be suffered to pocket the money for which this bill was drawn, or to enable the drawer to do so, but that sooner or later, provided a bankruptcy do not intervene, it must be paid, I presume no man will doubt. The drawer has received the value, the plaintiffs have paid it, and the defendant has it in his hands. On this short statement, every one who hears me must anticipate me in saying that the defendant must pay it. Nay if actual forgery had been committed, the defendant could not be permitted to retain the money; he must not get 900*l.* by the crime of another: but in such a case, I agree it would be difficult to sustain the present or any action for the money till something further had happened than has yet been done. The law, proceeding on principles of public policy, has wisely said, that where a case amounts to felony, you shall not recover against the felon in a civil action. But that rule does not appear by any  
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printed authority to have been extended beyond actions of trespass or *tort*, in which it is said that the trespass is merged in the felony. That is a rule of law calculated to bring offenders to justice. But whether that rule extend to any case after the offender is brought to justice, or whether at any time it may be resorted to in an action between persons guilty of no crime, are questions upon which I have formed no opinion, because this case does not require it. Upon this special verdict there is no foundation for saying that any one has been guilty of forgery, nor even of a fraud, as it strikes my mind. Fraud or felony is not to be presumed; and unless it be found by the jury, the Court cannot imply it. *Minet v. Gibson* is a most decisive authority for that proposition, if any be wanted; and I do not think there is any foundation for the distinction attempted to be taken between that case and the present. It has been contended that the party there recovered because the nature of the obligation was not altered; but the determination did not proceed entirely on that ground, but on this, that according to the true intent and meaning of the parties the bill was intended to be made payable to bearer: So here the plaintiffs do not attempt to enforce the contract contrary to the terms of it, but according to that form by which the defendant originally consented to be bound, as stated in the second count. The special verdict finds that *Peele and Co.* on 26th *March* 1788 drew a bill of exchange on the defendant for 974*l.* 10*s.* payable to *Wilkinson and Co.*, which bill, as the same has been altered, accepted, and written upon, is set out in *hæc verba*. Upon the *fac simile* copy of the bill set out in the verdict, there appears to be a blot over the date; and the jury have thought fit to read it, as it now stands, the 20th. I must confess I should never have read it so; for seeing that there was some thing above the figure 0, that is the last reading which I should have given to it. I should have said on the face of the bill, this must have been either a 6 or an 8; it could not have been 8, because the 0 is as high as the 2, and therefore it must be a 6. But the jury have found no difficulty in saying that it was a 6; and I will examine presently whether there be any objection to let it remain as a 6. The verdict further finds that the defendant before any alteration of the bill accepted it; and *Wilkinson and Co.* indorsed it to the plaintiffs, who paid a valuable consideration for it. Then it is stated that whilst the bill was in the hands of *Wilkinson and Cooke*, the date without the authority of the defendant was altered by persons un-



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known from the 26th to the 20th of *March*. They further find that the words 23d of *June* were inserted at the top of the bill, to mark that the bill would then become due; and that the alteration and the blot were on the bill when it was delivered to the plaintiffs. This is the full substance of the special verdict; and there is neither forgery, felony, or fraud, found or supposed by the jury; we therefore can neither intend or infer it. The verdict amounts only to saying there is a blot on the bill, but how it came there we don't know; and we beg to ask the Court whether the circumstance of a blot being on the bill which we cannot account for, makes the bill void. Provided I have accurately stated the question, surely such a verdict is without precedent. Suppose a child had torn out a bit of the bill on which the top of the 6 was written, is the holder of the bill to lose his 974*l*; or is the defendant to get 974*l*. by such an accident? But to decide whether I have accurately stated the question in the cause, it is necessary to examine the words of the special verdict minutely, and by degrees. The jury have said that the bill was altered. The word *altered* may raise a suspicion and alarm in our minds; but let not our judgment be run away with by a word, without examining the true sense and meaning of it, as it is used in the place where we find it. How was it altered, what is the alteration, when was it made, and for what purpose? The jury have said it was altered by means of putting a blot over the date; but by whom or when that was done we don't know, further than that it was done whilst the bill was in the possession of *Wilkinson* and *Cooke*; but we do not find that it was done for any bad purpose, or with any improper view whatever. Upon this finding the Court are bound to say it was done innocently. But the jury have also said that "*June 23d*" was inserted at the top of the bill to mark when the bill would become due. When and by whom was that done? The jury have not said one word upon the subject. Was that done even during any part of the time whilst the bill was in the possession of *Wilkinson* and *Cooke*? No. It is consistent with the finding that the plaintiffs, who are found to be *bonâ fide* holders of the bill, upon reading the date to be the 20th, and calculating the time which it had to run from that date, put down "*June 23d*" with the most perfect innocence. If the bill had been originally dated on the 20th, the 23d *June* would have been the true time of payment. But admitting that a wrong date had been put down, as denoting the time of payment, is there any case or authority which says that that circumstance

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shall render the bill void? Every bill which has been negotiated within the memory of man is marked by some holder or another with the day when it will become or is supposed to become due. That in some sense of the word is an alteration; for it makes an addition to the bill, which was not there when it was drawn or accepted. But was it done fraudulently? The answer is, it was not, and therefore it is of no avail. So here the jury have not said it was done fraudulently, and therefore it affords no objection. When the jury have stated what the alteration is, and how it was made, namely, by making a blot, and have fixed no sinister or improper motive for so doing, it is the same as if they had said only "here is a blot on the bill". Suppose the jury had said in few words that this bill was drawn, indorsed, and accepted by the defendant, as the plaintiffs allege, but here is a blot upon it which makes the date look like the 20th, instead of the 26th. The true answer would have been, blot out the blot by your own understanding and conviction, and pronounce your verdict according to the truth of the case. It was nobly said in another place (I heard it with pleasure, and thought it becoming the dignity of the person who pronounced it, and the place in which it was pronounced) "That the law is best applied, when it is subservient to the honesty of the case. And if there be any rule of law which says you cannot recover on any instrument but according to the terms of it, forlorn would be the case of plaintiffs. By the temperate rules of the law we must square our conduct." The honesty of the plaintiffs' case has been questioned by no one; and therefore I should imagine the wishes of us all would have been in favour of their claim, provided we are not bound down by some stubborn rule of law to decide against them. Here again I must beg leave to resort to what was forcibly said in another place, upon a similar subject, and which I shall do as nearly in the words which passed at the time as I can; because they carried conviction to my mind; because they contain my exact sentiments; and because they are more emphatical than any which I could substitute in the place of them. "The question (it was said) is whether there be any rule of law so reluctant that it will not recede from words to enforce the intention of the parties. I believe there is no such rule. For half of a century there have been various cases, which have left the question of forgery untouched. If a bill be forged the acceptor is bound." Speaking of the case of *Stone* against *Freeland*, it was said, "if any one say that case is not law, let him shew why



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" why it is not so. Judges can only look to former decisions. This  
" has been a rule in the commercial world above 20 years."

This reasoning seems to me to be sound, and decisive, if it apply to the present case: and to prove that it does apply, I need only quote the case mentioned at the bar of *Price* against *Shute*, reported in *Beawes's Lex Mercat. tit. Bill of Exchange, pl. 222.* and *Moll. 109.* There a bill was payable 1st *January*, and the person to whom it was directed accepted it to pay on the first of *March*, with which the servant returned to his master, who perceiving this enlarged acceptance struck out the first of *March*, and put in the first of *January*, and at that time sent the bill for payment, which the acceptor refused; whereupon the possessor struck out the first of *January*, and inserted the first of *March* again. In an action brought on this bill the question was, whether these alterations did not destroy the bill; and ruled by Lord Ch. J. *Pemberton*, that they did not. Now on reading this case, I cannot consider it in any other light than as an action brought against the acceptor; for it only states what passed between those parties. Here then is a rule, which has prevailed in the commercial world for 110 years; it stand uncontradicted and unimpeached; it was decided by great authority; and, as I take it, on deliberation. For when it is said to have been in *B. R.* that must either have been in this Court, or on a case saved by Ch. J. *Pemberton* for his own opinion; which was a common way of proceeding in those days. In that case the term *alteration* is used, and therefore we need not be frightened or alarmed at that word. The effect of the alteration was to accelerate the payment; so it is here. But in one respect that case goes beyond the present; for there the alteration was made by the plaintiff himself; here it was not. It is true in that case, when the plaintiff found he could not receive the money on the first of *January*, he altered it back to the first of *March*: but if the first alteration vitiated the bill, no subsequent alteration could set it up again against the acceptor, without his consent. Here the plaintiffs have not re-altered the bill; but they have acted a more honest part; they have left the bill as it was to speak for itself; but they have treated it as a bill of the 26th of *March*; they have proved that it was a bill of the 26th of *March*; they demanded payment according to that date; and the jury have found all these facts to be true. And it is material to consider what was the issue joined between the parties; for there is a great deal of difference between the plea of *non est factum* and the present; here the question is, whether the drawer made such a bill, and whether



whether the defendant accepted it : and this is found by the jury. Then the case of *Price v. Skute*, in sense and substance, is a direct authority in point with the present ; though it vary in a minute and immaterial circumstance. The plaintiffs in treating the bill, and making a demand as they have done, seem to have followed the sober advice and directions given by *Beawes* in *pl.* 190 ; where he says, “ he that is possessor of a bill, which only says *pay*, without mentioning the time when, or that is without a date, or *not clearly and legibly written*, payable some time after date, &c, so that the certain precise time of payment cannot be calculated or known, must be very circumspect, and demand the money whenever there is any probable appearance of the time being completed that was intended for its payment ; or that he can demonstrate any circumstance that may determine it, or make it likely when it shall be paid. It is impossible that this writer could have supposed that the bill was rendered void by any blot, obliteration, or erasure ; on the contrary he tells you that it must be demanded in time, and that you may make out by circumstances or other evidence when it was, or was likely to be, payable. That has been made out by evidence in the present case. Upon this head I shall only add one authority more, which is *Carth.* 460 ; where a bill was accepted after the day of payment was elapsed. It was objected that it was impossible in such a case for the defendant to pay according to the tenor of the bill, and therefore the declaration was bad : but the Court held it good, and said the effect of the bill was the payment of the money, and not the day of payment. So here the defendant, having accepted this bill, whatever may be the construction as to the date, must pay the money. I hold that in this case there is no fraud either express or implied ; and that as the plaintiffs have proved that they gave a valuable consideration for the bill, and that it was indorsed to them by those through whose hands it passed, their case is open to no objection whatever. But I will suppose for a moment, though the case do not warrant it, that *Wilkinson* and *Cooke* did mean a fraud ; still I am of opinion that would not affect the case between the plaintiffs and the defendant. It is a common saying in our law books that fraud vitiates every thing. I do not quarrel with the phrase, or mean in the smallest degree to impeach the various cases which have been founded on the proof of fraud. But still we must recollect, that the principle which I have mentioned is always applied *ad hominem*. He who is guilty of a fraud shall



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never be permitted to avail himself of it; and if a contract founded in fraud be questioned between the parties to that contract, I agree, that as against the person who has committed the fraud, and who endeavours to avail himself of it, the contract shall be considered as null and void. But there is no case in which a fraud intended by one man shall overturn a fair and *bonâ fide* contract between two others. Even as between the parties themselves we must not forget the figurative language of Lord Ch. J. *Wilmot*, who said "that the statute law is like a tyrant; where he comes, he makes all void: but the common law is like a nursing father, and makes void only that part where the fault is, and preserves the rest." 2 *Willf.* 351. If an alteration be made to effect a fraud, the alteration shall be laid out of the question; but still the contract shall exist to its original and its honest purpose, and shall be carried into execution as if the fraud had never existed. A case somewhat similar to this is to be found in the book which I have before quoted, and which though not a binding legal authority, yet, where its propositions are founded on practice and good sense, is deserving of some attention. *Beawes, tit. Bill of Exchange, pl. 132.* says, where the possessor of a bill payable to his order fails, and to defraud his creditors indorses it to another, who negotiates it, and effectually receives the value, indorsing it again to a third &c, and though the creditors having discovered the fraud oppose it, yet the acceptant must pay it to him who comes to receive it, on proof that he paid the real value for it. But it has been contended that there is an analogy between bills of exchange and deeds, and that in the case of deeds any erasure or alteration will avoid the deed. In answer to this, first, I deny the analogy between bills of exchange and deeds; and there is no authority to support it. In the case of deeds, there must be a *profert*; and as we learn from 10 *Co.* 92. *b.* in ancient times the judges pronounced upon view of the deed, though Lord *Coke* says that practice was afterwards altered. But there never is a *profert* of a bill of exchange; the judges cannot determine on a view of that; but it must be left to a jury to decide upon the whole of the evidence, according to the truth of the case. Again, in the cases of joint and several bonds the objection was founded on its being a substantial injury to the defendant; for if it were considered as a sole bond, the defendant would be answerable for the whole debt: but if it were a joint bond, he would be liable to only half or other proportionable



part of it. So far in those days did the Court look into the equity of the case. But the blot on this bill is no injury to the defendant; he is not liable to pay till the bill became due, computing the time from the original date; then he must pay it; he alone is liable; and he never can be charged a second time on the bill. 2dly, It is not universally true that a deed is destroyed by an alteration, or by tearing off the seal. In *Palm.* 403. a deed which had erasures in it, and from which the seal was torn, was held good; it appearing that the seal was torn off by a little boy. So in any case where the seal is torn off by accident after plea pleaded, as appears by the cases quoted by the plaintiffs' counsel. And in these days, I think even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration, which would obviate every doubt upon that point, by stating the truth of the case. The difficulty, which arose in the old cases, depended very much on the technical forms of pleading applicable to deeds alone. The plaintiff made a *profert* of the deed under seal, which he still must do, unless he can allege a sufficient ground for excusing it: when that is done, the deed or the *profert* must agree with that stated in the declaration, or the plaintiff fails. But a *profert* of a deed without a seal will not support the allegation of a deed with a seal. For these reasons I am of opinion that the plaintiffs are entitled to judgment on the 2d count, which is drawn upon the bill, stating it to bear date the 26th *March*.

But supposing there could be any doubt on this part of the case, I am also of opinion that the plaintiffs are entitled to their judgment on either of the two counts for money paid, or for money had and received. Here it is material to recall to our minds the facts found by the verdict. The bill produced to the jury was drawn for value, and was accepted by the defendant. He is not found to have no effects of the drawer's in his hands; and his accepting the bill imports, and is at the least *prima facie* evidence, that he had, and on this verdict he must be taken to have, the amount in his hands. In *Burr.* 1675, *Aston, J.* said, it is an admission of effects. By his acceptance he gave faith to the bill; and the plaintiffs giving credit to that fact have actually paid the value of the bill on receiving it. On this case the money paid by the plaintiffs is money paid for the use of the defendant; for the money was advanced on the credit of the defendant, and in consequence of his undertaking to pay the bill. Again, the money in the defendant's hands is so much money

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money received by him for the use of the plaintiffs, who were holders of the bill when it became due. The defendant has got that money in his pocket, which in justice and conscience the plaintiffs ought to have, and therefore they are entitled to recover it in an action for money had and received.

In answer to this, it was in the last term suggested for consideration, whether this bill after the alteration were not a *chose in action*, which could not be assigned? It is laid down in our old books that for avoiding maintenance a *chose in action* cannot be assigned, or granted over, to another. *Co. Lit.* 214. a. 266. a. 2 *Roll.* 45. l. 40. The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case. In 2 *Roll. Abr.* 45. & 46. it is admitted that an obligation or other deed may be granted, so that the writing passes; but it is said that the grantee cannot sue for it *in his own name*. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name, or in the name of the grantor, does not seem to me to affect the question of maintenance. It is curious and not altogether useless to see how the doctrine of maintenance has from time to time been received in *Westminster Hall*. At one time not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expence which he would otherwise be put to, was held guilty of maintenance. *Bro. tit. Maintenance* 7. 14. 17, &c. Nay if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna* or suppress the truth. That such doctrine repugnant to every honest feeling of the human heart should be soon laid aside must be expected. Accordingly a variety of exceptions were soon made; and amongst others it was held, that if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it. 2 *Roll. Abr.* 115. But in the midst of all these doctrines on maintenance, there was one case in which the courts of law allowed of an assignment of a *chose in action*, and that was in the case of the Crown; for the Courts did not feel themselves bold enough to tie up the property of the crown, or to prevent that from being transferred. 3 *Leon.* 198. 2 *Cro.* 180. Courts of equity from the earliest times thought the doctrine too absurd for them to adopt; and therefore they always acted in direct contradiction to it. And we shall soon see that courts of

law



law also altered their language on the subject very much. In 12 *Mod.* 554. The Court speak of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties; and to which they must give their sanction, and act upon. So an assignment of a *chose in action* has always been held a good consideration for a promise. It was so in 1 *Rol. Ab.* 29. *Sid.* 212. and *T. Jones* 222; and lastly by all the judges of *England* in *Mouldsdale* against *Birchall*, 2 *Black.* 820. though the debt assigned was uncertain. After these cases, we may venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails. But still it must be admitted that though the courts of law have gone the length of taking notice of assignments of *choses in action* and of acting upon them, yet in many cases they have adhered to the formal objection, that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving that shadow, when the substance is gone; and that it is merely a shadow is apparent from the later cases, in which the Court have taken care that it shall never work injustice. In *Bottomley v. Brooke*, *C. B. Mich.* 22 *G.* 3 (a), which was debt on bond, the defendant pleaded that the bond was given for securing 100 *l.* lent to the defendant by *E. Chancellor*; and was given by her direction in trust for her, and that *E. Chancellor* was indebted to the defendant in more money. To this plea there was a demurrer, which was withdrawn by the advice of the Court. In *Rudge v. Birch*, *K. B. Mich.* 25 *G.* 3. (b), on the same pleadings there was judgment for the defendant. And in *Winch v. Keeley*, *K. B. Hil.* 27 *Geo.* 3 (c), where the obligee assigned over a bond, and afterwards became a bankrupt, the Court held that he might notwithstanding maintain the action. Mr. J. *Ashurst* said, "It is true that formerly courts of law did not take notice of an equity or a trust: but of late years, as it has been found productive of great expense to send the parties to the other side of the *Hall*, wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this Court will take notice of a trust, why should they not of an equity. It is certainly true that a *chose in action* cannot strictly be assigned, but this Court will take notice of a trust, and see who is beneficially interested." But admitting that on account of this quaint maxim there may still be some cases in which an

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action cannot be maintained by an assignee of a *chose in action* in his own name; it remains to be considered whether that objection ever did hold or ever can hold in the case of a mercantile instrument or transaction. The law-merchant is a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith. In *Pillan v. Van Mierop*, Lord *Mansfield* said, if a man agree to do what if finally executed would make him liable, as in a court of equity, so in mercantile transactions, the law looks on the act as done. I can find no instance in which the objection has prevailed in a mercantile case; and in the two instances most universally in use it undoubtedly does not hold, that is in the cases of bills of exchange, and policies of insurance. The first is the present case; and bills are assignable by the custom of merchants: so in the case of policies of insurance; till the late act was made, requiring that the name of the person interested should be inserted in the policy, the constant course was to make the policy in the name of the broker, and yet the owner of the goods maintained an action upon it. Circulation and the transfer of property are the life and soul of trade, and must not be checked in any instance. There is no reason for confining the power of assignment to the two instruments which I have mentioned; and I will shew you other cases in which the Court have allowed it. 1st, In *Fenner v. Mears*, where the defendant, a captain of an *East-Indiaman*, borrowed 1000 *l.* of *Cox*, and gave two respondentia bonds, and signed an indorsement on the back of them, acknowledging that, in case *Cox* chose to assign the bonds, he held himself bound to pay them to the assignees. *Cox* assigned them to the plaintiff who was allowed to recover the amount of them in an action for money had and received. *De Grey*, Ch. J. In disposing of the motion for a new trial, said (a) Respondentia bonds have been found essentially necessary for carrying on the *India* trade; but it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the first obligee. This contract is therefore devised to operate upon subsequent assignments, and amounts to a declaration, that upon such assignment the money which I have borrowed shall no longer be the money of *A*, but of *B*, his substitute. The plaintiff is certainly intitled to the money in conscience; and therefore I think intitled also at law: For the defendant has promised to pay any person who is intitled to the money." So in the present case, I say the plaintiffs are in

(a) 2 Bl. Rep. 1272.



conscience entitled to the money, and the defendant has promised to pay, or which is the same thing is by law bound to pay, the money to any person who is entitled. The very nature and foundation of an action for money had and received is that the plaintiff is in conscience intitled to the money; and on that ground it has been repeatedly said to be a bill in equity. We all remember the sound and manly opinion given by my Lord Chief Justice here in the beginning of the last term on a motion made by Mr. *Bearcroft* for a new trial, wherein he said if he found justice and honesty on the side of a plaintiff here, he would never turn him round, in order to give him the chance of getting justice elsewhere. 2dly, *Clarke v. Adair*, Sittings after *Easter* 4 Geo. 3. *Debray* an officer drew a bill on the agent of a regiment payable out of the first money which should become due to him on account of arrears or non-effective money. *Adair* did not accept the bill, but marked it in his book; and promised to pay when effects came to hand. *Debray* died before the bill was paid; and the administratrix brought an action against *Adair* for money had and received. It was allowed by all parties that this was not a bill within the custom of merchants: But Lord *Mansfield* said it is an assignment for valuable consideration, with notice to the agent, and he is bound to pay it. He said he remembered a case in Chancery, where an agent under the like circumstances had paid the money to the administrator, and was decreed notwithstanding to pay to the person, in whose favor the bill was drawn. 3dly, In *Israel v. Douglas* C. B. *East*. 29 G. 3. (a) *A.* being indebted to *B.* and *B.* indebted to *C.* *B.* gave an order to *A.* to pay *C.* the money due from *A.* to *B.*; whereupon *C.* lent *B.* a further sum, and the order was accepted by *A.* On the refusal of *A.* to comply with the order, it was held that *C.* might maintain an action for money had and received against him. And Mr. *J. Heath* expressly said he thought in mercantile transactions of this sort such an undertaking may be construed to make a man liable for money had and received. This opinion was cited with approbation in the House of Lords in *Gibson v. Minet*. Lastly, I come to the case of *Tatlock v. Harris*, [ante 3 vol. 182.] in which Lord *Kenyon*, in delivering the judgment of the Court, said it "was an appropriation of so much money to be paid to the person who should become the holder of the bill. We consider it as an agreement between all the parties to appropriate so much property to be carried to the account of the holder of the bill;

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(a) 1 H. Bl. 242.

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and this will satisfy the justice of the case, without infringing any rule of law." All these cases prove that the remedy shall be enlarged, if necessary, to attain the justice of the case; and that if the plaintiff has justice and conscience on his side, and the defendant has notice only, the plaintiff shall recover in an action for money had and received. Let us not be less liberal than our predecessors, and even we ourselves, have been on former occasions. Let us recollect, as Lord Ch. J. *Wilmot* said in the case I have alluded to, that not only *boni judicis est ampliare jurisdictionem*, but *ampliare justiciam*: and that the common law of the land is the birthright of the subject, under which we are bound to administer him justice, without sending him to his writ of *subpœna*, if he can make that justice appear. The justice, equity, and good conscience, of the case of these plaintiffs can admit of no question; neither can it be doubted but that the defendant has got the money which the plaintiffs ought to receive. For these reasons I am of opinion that the plaintiffs are entitled to judgment on either of these three counts in the declaration, namely, on the count on the bill of exchange, stating the date to be the 26th; or on the count for money paid; or on the count for money had and received.

GROSE, J. The only question in this case is, whether there appears on the face of this special verdict a right of action in the plaintiffs on any of the counts. The first count is on a bill of exchange dated the 20th of *March*; but, there being no proof of any bill of that date, there is clearly an end of that count. The second is on a bill dated the 26th of *March*; but the defendant objects to the plaintiffs' recovering on this count also, because, the bill having been altered while it was in the hands of *Wilkinson* and *Cooke*, it is not the same bill as that which was accepted; and that is the true and only question in the cause. My idea is that the plaintiffs' right of action, as stated in this count, cannot be maintained at common law, but is supported only on the custom of merchants, which permits these particular *choses in action* to be transferred from one person to another. The plaintiffs, as indorsees, in order to recover on this bill, must prove the acceptance by the defendant, the indorsement from *Wilkinson* and *Cooke* to them, and that this was the bill which was presented when it became due. Now has all this been proved? The bill was drawn on the 26th of *March*, payable at 3 months date; the defendant's engagement by his acceptance was, that it should be paid when it became due, according to that date; but afterwards the date



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was altered; the date I consider as a very material part of the bill, and by the alteration the time of payment is accelerated several days: according to that alteration, the payment was demanded on the 23d of *June*, which shews that the plaintiffs considered it as a bill drawn the 20th of *March*; then the bill which was produced in evidence to the jury was not the same bill which was drawn by *Peele* and Co. and accepted by the defendant; and here the cases, which were cited at the bar, apply. *Piggott's* is the leading case; from that I collect that when a deed is erased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of plea pleaded it was not his deed; and 2dly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds: but it is said that that law does not extend to the case of a bill of exchange; whether it do or not must depend on the principle on which this law is founded. The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and, when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is no where said that the deed is void, merely because it is the case of a deed, but because it is *not the same deed*. A deed is nothing more than an instrument or agreement under seal: and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party, in whose favor it is made, from attempting to make any alteration in it. This principle too appears to me as applicable to one kind of instruments as to another. But it has been contended that there is a difference between an alteration of bills of exchange and deeds; but I think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal, than in the latter case. Supposing a bill of exchange were drawn for 100*l.* and after acceptance the sum was altered to 1000*l.* It is not pretended that the acceptor shall be liable to pay the 1000*l.*: and I say that he cannot be compelled



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to pay the 100*l.* according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it would not have continued the same bill. And the alteration in every respect prevents the instrument's continuing the same, as well when applied to a bill as to a deed. It was said that *Piggott's* case only shews to what time the issue relates: but it goes further, and shews that if the instrument be altered at any time before plea pleaded, it becomes void. It is true the Court will enquire to what time the issue relates in both cases. Then to what time does the issue relate here? The plaintiffs in this case undertook to prove every thing that would support the *assumpsit* in law, otherwise the *assumpsit* did not arise. It was incumbent on them to prove that, before the action was brought, this identical bill, which was produced in evidence to the jury, was accepted by the defendant, presented, and refused: but if the bill, which was accepted by the defendant, were altered before it was presented for payment, then that identical bill, which was accepted by the defendant, was not presented for payment; the defendant's refusal was a refusal to pay another instrument; and therefore the plaintiffs failed in proving a necessary averment in their declaration. If the bill had been presented and refused payment, and it had been altered after the action was brought, then it might have been like the case mentioned at the bar. It was contended at the bar that the enquiry before a jury in an action like the present should be, whether or not the defendant promised to pay the bill at the time of his acceptance: but granting that he did so promise, that alone will not make him liable, unless that same bill were afterwards presented to him. I will not repeat the observations which have been already made by my Lord on the case in *Molloy*: but the note of that case is a very short one; and the principle of it is not set forth in any other book, nor indeed do the facts of it sufficiently appear. I doubt also whether it was a determination of this Court: it only appears that there was a point made at *nisi prius*, but not that it was afterwards argued here. But it has been said that a decision in favour of the plaintiffs will be the most convenient one for the commercial world: but that is much to be doubted; for if, after an alteration of this kind, it be competent to the Court to enquire into the original date of the instrument, it will also be competent to enquire into the original sum and the original payee, after they have been altered, which would create much



confusion, and open a door to fraud. Great and mischievous neglects have already crept into these transactions; and I conceive that keeping a strict hand over the holders of bills of exchange to prevent any attempts to alter them may be attended with many good effects, and cannot be productive of any bad consequences, because the party, who has paid a value for the bill, may have recourse to the person who immediately received it from him. On these grounds, therefore, I am of opinion that the plaintiffs cannot recover on the second count. Neither do I think that they can recover on the general counts, because it is not stated as a fact in the verdict that the defendant received the money, the value of the bill.

*Per Curiam,*

Judgment for the defendant.

JENNINGS *against* NEWMAN, Administratrix.

Tuesday,  
July 5th.

THE four first counts in this declaration were on promises made by the intestate; the fifth stated that after the death of the intestate, the defendant, as administratrix, was indebted to the plaintiff in 1000*l.* for so much money by the defendant, as such administratrix, had and received to and for the use of the plaintiff. To this there was a special demurrer, because the two causes of action, the one from the intestate, and the other from the administratrix, could not be joined.

A count on a promise made by the defendant, as administrator, to pay money received by him, as such, to the plaintiff's use, cannot be joined with other counts on promises made by the intestate.

*Baldwin*, in support of the demurrer, after observing that those counts only could be joined, to which the same plea might be pleaded, and on which the same judgment might be given (a), insisted that the fifth count in this declaration could not be joined with the preceding ones, because the defendant could not plead *plenè administravit* to that count, as the cause of action arose after the death of the testator, *Barry v. Rusb* (b); and because the plaintiff would be entitled to a judgment *de bonis propriis* on this count, whereas the others would only warrant a judgment *de bonis testatoris*.

*Wigley, contra*, answered that the whole cause of action was against the defendant in the character of administratrix; that she was named as such at the beginning of the declaration; and each of the counts alleged the promise to have been made by her as administratrix. If so, the defendant might plead *plenè administravit* to the last count, as was done in *Rann v. Hughes* (c).

(a) *Brown v. Dixon*, ante 1 vol. 274. and 1 Will. 252.

(b) *Ante* 1 vol. 691.

(c) 7 Bro. Parl. Cas. 550.



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as well as to the other counts, and the same judgment *de bonis testatoris* may be given upon all. And this is distinguishable from the case of *Hawkes v. Saunders* (a), because there the declaration was against the defendant in her own right. In *King v. Thom* (b), where the payee of a bill of exchange indorsed it to A. and B. as executors, it was held that they might declare on it as such in an action against the acceptor. Then by a parity of reasoning the creditor of an intestate may sue the administrator for money received by him as such. With respect to the case of *Barry v. Rusb*; there the defendant had given a bond as administrator to submit to an award, touching matters in difference between the intestate and a third person; and the Court held that the entering into the bond was an admission of assets, and precluded the defendant from pleading *plenè administravit*. If the case of *Rose and Wife v. Bowler* and another, executors (c), be cited on the other side, where it was said that an executor could not be charged as such, for money had and received by him, because it made him personally liable, the answer is that this was only incidentally noticed with other objections, and the Court seem principally to have determined that case on the ground that money could not be received to the use of the husband and wife, without any meritorious cause of action appearing in the wife. But

The Court were clearly of opinion that these counts could not be joined, because the last count stated a cause of action after the intestate's death, which would exclude one of the pleas that might be pleaded to the other counts, and would warrant a different judgment. But they gave the defendant leave to amend, by striking out the last count, on payment of costs.

(a) *Coop.* 289.(b) *Ante* 1 vol. 487.(c) *H. Bl. Rep.* 108.Wednesday,  
July 6th.

## The KING against The Inhabitants of BRAMPTON.

A settlement  
may be gain-  
ed by renting  
the fogs, or  
after-grass, of  
a meadow of  
the yearly  
value of 10*l.*

THE pauper, *Thomas Caile*, rented certain premises in *Brampton* in *Cumberland*, of the yearly value of 9*l.*; and during part of the time took the fogs, or after-grass, of two fields, the one for 30*s.*, and the other for a guinea, a-year; the whole of which together he occupied for more than 40 days. The Sessions confirmed the order, by which he was removed from *Penrith* to *Brampton*.

On a rule to shew cause why the order of Sessions should not be quashed,



The Court were clearly of opinion that the pauper gained a settlement in *Brampton*; and that this could not be distinguished from that of *R. v. Stoke* (a). And they held that taking land for a particular purpose, such as that of raising potatoes (b), was sufficient to confer a settlement.

Order of Sessions confirmed (c).

Law in support of the order of Sessions; *Chambre, contra*.

(a) *Ante* 2 vol. 451.

(b) *R. v. Shenston*, *Burr. S. C.* 474.

(c) *Vid. R. v. Priddletrenbide*, *ante*

3 vol. 772.

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# KING, *qui tam*, against HORNE.

Wednesday,  
July 6th.

THIS was an action to recover certain penalties under the lottery act, 27 *Geo. 3. c. 1.*; the second section of which, after providing that the penalties therein mentioned may be recovered by action of debt, bill, plaint, suit, or information, in any of his majesty's courts of record at *Westminster*, enacts "that upon every such action, bill, plaint, suit, or information, a *capias* or other writ shall and may issue; the first process specifying therein the amount of the penalty or penalties sued for, whereof an affidavit shall be first made and filed." The writ in this case was a common bill of *Middlesex* in debt, not specifying the amount of the penalties, nor giving any information to the defendant that the action was commenced on the lottery act; nor was there any affidavit, previous to the suing out of the writ. But the penalties sued for were stated in the declaration, which the defendant took out of the office, in the ordinary course; and afterwards he obtained a rule to shew cause why the bill of *Middlesex* should not be quashed, and the subsequent proceedings stayed for irregularity, on the ground that previous to the suing out of the writ the plaintiff should have made an affidavit specifying the amount of the penalties sued for, or that it should have been stated in the bill of *Middlesex* itself.

A plaintiff, who sues for penalties under the lottery act, 27 *Geo. 3. c. 1. s. 2.*, must make an affidavit previous to the suing out of the writ, specifying the amount of the penalties sued for, and that amount must be specified in the first process.

*Bearcroft*, *Wood*, and *Lowndes*, now shewed cause; contending that, as the Legislature had in express terms given to the informer an action of debt in the prior part of this clause, they had virtually given the common law process in debt; and that that remedy was not taken away by the subsequent part of the section, which also gives an extraordinary process, where the plaintiff wishes to hold the defendant to bail. For the extraordinary process is only adapted to those cases where bail is required, in order that the amount of the sum for which the bail are to



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justify may be ascertained on the process itself. The latter part of the section, after directing that the first process shall specify the amount of the penalties sued for, whereof an affidavit shall be first duly made, &c. and the defendant shall in *such case* be obliged to give sufficient bail or security to answer and pay all the forfeitures and penalties, &c." But in this case the defendant was not held to bail, and the affidavit is only required to be made in those cases where the party is holden to bail. And though the Legislature intended in such cases that the party sued should know at the commencement of the action the precise sum for which he was sued, they did not mean to throw additional difficulties in the ordinary mode of suing for the penalties, given by the former part of this section, in cases where the plaintiff was not desirous of holding the defendant to bail. And indeed it is greatly to the advantage of persons, who are sued under this act, that the present mode of proceeding should be allowed, otherwise the informers must necessarily hold them to bail. But even if there were any irregularity in this case, it has been waved by the defendant's taking the declaration out of the office, which he need not have done for the purpose of knowing the nature of the action and the amount of the penalties sued for, since he might have been equally apprized of those by reading the declaration in the office.

*Erskine*, and *Garrow*, in support of the rule, said that on reading the words of the act of parliament there was no foundation for the distinction attempted to be taken, for that the whole of the second section was applicable only to cases of bailable writs. After giving an action of debt &c, it proceeds thus; "and upon every *such action* &c, a *capias* &c, shall issue; the first process specifying therein the amount of the penalties &c, whereof an affidavit shall be first made &c." The Legislature made it a condition to the issuing of any process for the recovery of any penalties under this act that the first process should specify the amount of the penalties, and that a previous affidavit should be made, before which no writ could issue, in which also should be contained the amount of the penalties: but whether that, or the bill of *Middlesex*, or both of them, should have contained such information is immaterial in this case, because no affidavit at all was made, and the bill of *Middlesex* was in the common form. With respect to the waver of this irregularity; if the statute be mandatory, no act of the party can dispense with it. And even if he could, the defendant could not



wave that of which he was not apprized; and he could not know the amount of the penalties, or even that he was sued on the lottery act, till he had taken the declaration out of the office.

*Per Curiam.* The act of parliament is imperative, that the amount of the penalties sued for shall be specified in the first process; and, as the plaintiff has not pursued the regulations of the act, these proceedings cannot be supported. The statute has also directed that an affidavit shall be made, though perhaps the plaintiff may waive holding the defendant to bail. There is no distinction in the act between bailable writs and those which are not so; but the words "the first process specifying therein the amount of the penalties sued for &c," relate to the whole of the antecedent part of the clause. And this regulation seems founded in reason; that it might be notorious on what account the informer sued, so that it should not be in his power afterwards to compromise with the defendant, and deprive the king of his share of the penalties.

Rule absolute.

GARDNER *against* PARKER.

Wednesday,  
July 6th.

THE defendant, a churchwarden, having sued the plaintiff in the Consistorial Court of the bishop of *Gloucester*, for breaking open a chest in the church, and taking the title deeds to the advowson out of it,

*Lane* obtained a rule to shew cause why a prohibition should not be granted, on the ground that this was a subject cognizable in the temporal courts only; against which

*Bower* now shewed cause; relying on the case of *Welcome v. Lake* (a); where, on a libel in the Spiritual Court for taking the church bells, this court refused to grant a prohibition, because, though the churchwardens might have maintained an action at common law, they said the most proper remedy was in the Spiritual Court. But

Lord KENYON, Ch. J. said, that this was distinguishable from the case cited; for there the parties, who libelled in the Ecclesiastical Court, were the *custodes* of that property, the bells being the goods of the church; whereas the subject of this suit were title deeds, for taking which only trespass or trover could be maintained in the temporal courts.

Rule absolute (b).

(a) 1 Sid. 281. 2 Keb. 22.

(b) Vid. 2 Inst. 492. and Salk. 547.

1791.

KING  
*qui tam*  
*against*  
HORNE.

Prohibition  
to stay a suit  
in the Spirit-  
ual Court,  
for breaking  
open a chest  
in the church,  
and taking  
away the  
title deeds to  
the advow-  
son.



1791.

Thursday,  
July 7th.HILL *against* BOLT.

Where bail is put in after attaching the sheriff, and a trial has not been lost, the Court will set aside the attachment; for in this case the plaintiff is not intitled to the benefit of it as a security, in case he should recover: *Secus*, if a trial has been lost.

*MORGAN* moved, on a former day, to set aside the attachment against the sheriff, on payment of costs, bail having been put in, and no trial lost, on the ground that the Court would grant this of course as no trial had been lost.

*Shepherd, contra*, contended that the practice was, that after an attachment had issued against the sheriff, it always remained as a security in case the plaintiff recovered a verdict. And that was the difference in this respect between taking an assignment of the bail bond, and attaching the sheriff; in the first instance the sheriff was entirely discharged; in the other he continued at all events liable to answer the plaintiff's demand, in case he obtained a verdict, notwithstanding bail were afterwards put in.

*Morgan*, in support of his rule, relied on the practice as to bail bonds, on which an assignment had been taken; that, after bail were justified, the Court would not require the bail bond to remain as a security, unless a trial had been lost; and he observed that there was no reason why that should be distinguished from this case.

*The Court* directed the matter to stand over for an inquiry into the practice; and on this day,

Lord KENYON, Ch. J. said that the master had furnished them with a note of *Gravett and Williams (a)*, and reported the practice to be that the attachment against the sheriff ought not to stand as a security, as no trial had been lost. And he desired that such might be considered to be the practice in future.

Rule absolute.

(a) *Gravett v. Williams*, T. 15 G. 3. B. R. An attachment having issued against the sheriff, and the debt and costs paid by the sheriff into the hands of the coroner,

*Baldwin* moved that further proceedings on the attachment might be stayed.

*Cowper*, who shewed cause, contended that the plaintiff had lost a term (a), and

therefore that the attachment ought to stand as a security, in case the plaintiff should recover a verdict. After much altercation at the bar

*The Court* ordered the attachment to remain in the office as a security for the plaintiff's debt, and the defendant to consent to go to trial at the Sittings after term.

(a) "Term" means a trial in the term.



1791.

MORSE *against* M. WILSON.Friday,  
July 8th.

**D**EBT on bond for 4000*l.* The defendant, after craving oyer of the bond, which was a joint and several bond by the defendant *Matthew*, and *Harry, Wilson*; and of the condition, which was that the bond should be void if the defendant, or *Harry Wilson*, should pay 2000*l.* with lawful interest for the same at 5*l. per cent.*; pleaded that before the executing of the bond *Harry Wilson* was possessed (amongst other things) of two shares, calculated to be of the value of 1000*l.* each share, in a brewhouse situate, &c; and which brewhouse and the business thereof were then occupied and carried on by him and one *William Cator* and *Francis Jefferies* in partnership together, under the firm of *Cator and Co*; which two shares were thereafter expected to produce a large surplus of profits to *Harry*, over and above what would be sufficient to satisfy and pay the interest of 2000*l.* after the rate of 5*l. per cent.* for the forbearance; and thereupon, on, &c, at &c, it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the plaintiff and *Harry Wilson*, that the plaintiff should lend to the said *Harry* 2000*l.*, and should forbear and give day of payment thereof to the said *Harry* until and upon the said 11th day of *June* 1789; and that for such forbearance and giving day of payment of the said 2000*l.* the said *Harry* should pay to the plaintiff not only interest for the said 2000*l.* for and during the time of such forbearance, after the rate of 5*l. per cent.* but also such surplus profits as should arise during the time of such forbearance on the said two shares, after 5*l. per cent. per annum* for the said 2000*l.* should be paid; and that for securing the re-payment of the said 2000*l.* with interest, at the rate of 5*l. per cent. per annum*, the said *Harry* and defendant should execute the bond &c; and that for securing the payment of such surplus profits as aforesaid, the said *Harry* should make and subscribe a certain writing, bearing date the 11th *June* 1788, purporting that in consideration of the said 2000*l.* received by the said *Harry* from the plaintiff, he the said *Harry* for himself, his executors &c, made over to the said plaintiff, his heirs, executors, &c, the said two shares &c; (that is to say), that after 5*l. per cent.* was paid on the said capital of 2000*l.* such surplus as should arise on the said two shares, which was calculated

If the borrower of money give a bond for the principal and interest at 5*l. per cent.*, and covenant at the same time also to pay to the lender a certain portion of the profits of a trade carried on by him in partnership with another person, this is an usurious contract, and the obligee cannot recover on the bond.



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MORSE  
against  
WILSON.

at 1000*l.* each share, should be *bonâ fide* the property of the plaintiff, and should be paid to the plaintiff on demand; and covenanted that on the 24th of every month of *June* during the time the said *Harry* should be in possession of the said 2000*l.* he would produce the full and true accounts of the profits, such as were made up by the said *Harry* and his partners, &c. The plea then stated that the plaintiff afterwards, (to wit), on &c, at, &c, and in pursuance of the said corrupt agreement, lent to the said *Harry* the said 2000*l.* and forbore and gave day of payment thereof to the said *Harry* until and on the said 11th *June* 1789; and that after the making of the said corrupt agreement, and in pursuance thereof, and for securing the re-payment of the said 2000*l.*, with interest at the rate of 5*l. per cent. per annum* (to wit), on &c, at &c, the said *Harry* and the defendant executed the bond, &c, with the said condition thereunto subscribed; and that in further pursuance of the said corrupt agreement, and for securing the payment of such surplus profits as aforesaid, afterwards, (to wit), on &c, at &c, the said *Harry Wilson* made and subscribed a certain writing, bearing date the said 11th *June* 1788, according to the purport and effect in that behalf aforesaid; the defendant then averred that the surplus of the profits so agreed to be paid by the said *Harry* to the plaintiff, together with the interest, so agreed to be paid by the said *Harry* to the plaintiff, and so secured by the bond and the writings so made, &c, exceeded the rate of 5*l. per cent. per ann.* contrary to the form of the statute, &c; by means whereof the bond is null and void. To this there was a demurrer; stating for cause that it did not appear that there were any surplus profits arising during the time of the said forbearance on the two shares in the plea mentioned; or that any thing by the said agreement agreed to be paid by the said *Harry* to the plaintiff, together with the said interest so agreed to be paid by the said *Harry* to the said plaintiff, and so secured by the bond, exceeded the rate of 5*l. per cent.* for the forbearance of each 100*l. per annum*, contrary to the form of the statute &c; joiner in demurrer.

*Chambre*, in support of the demurrer, contended that this contract was not usurious; for, although the plaintiff was entitled to the surplus profits of the two shares, in addition to the 5*l. per cent.* on the money lent, and although as between him and the partners he was not answerable for the losses in the trade, yet to all the rest of the world he was responsible for the partnership debts,



debts, and thus his principal was in hazard. And it is essential to the crime of usury that the principal, upon which more than legal interest is reserved, should not be put in hazard. The distinction taken by *Dodderidge, J.* in *Cro. Jac.* 508. has always been considered (a) as the rule upon which questions of this sort must be decided; "If I lend 100*l.* to have 120*l.* at the year's end upon a casualty; if the casualty goes to the interest only, and not to the principal, it is usury; for the party is sure to have the principal again, come what will come: but if the interest and principal are both in hazard, it is not then usury." If it be objected that by the terms of this contract the principal is secured at all events, the answer is that it is no farther secured in this case than in the case of every sleeping partner, who receives 5*l. per cent.* on his own share of the capital besides his proportion of the profits. And it is immaterial whether there be or be not a clause in the agreement to subject such sleeping partner to the partnership debts, because the law annexes such liability to the right of receiving the profits of the trade. The question relative to secret partners was very fully considered in *Grace v. Smith* (b); where a partner, who retired from trade, left a sum of money in the business, for which he was to receive a certain annuity, over and above his 5*l. per cent.*; and the Court held that he could not be considered as a secret partner, because it would be unjust to subject a party to the indefinite losses of trade, from which he could only receive a stipulated profit. But here, as the plaintiff is entitled to the whole amount of the profits of the two shares, he must be responsible to the world for the losses. In the case in *Blackst.* another of *Bloxham* and *Fourdrinier* is cited, which is much stronger than the present; where *Pell*, who retired from business, left a sum of money behind, and took a bond from *Brooke* his partner to secure an annuity of 200*l.* for six years, over and above 5*l. per cent.* for his money, in lieu of the profits of the trade; and this Lord *Mansfield* held made him a partner: now here the plaintiff was entitled to the profits themselves.

*Dallas, contra*, was stopped by the Court.

Lord KENYON, Ch. J. Nothing can be clearer than this case. The plaintiff, without having any partnership in contemplation, lent 2000*l.* to *H. Wilson*, for which he was to receive not only 5*l. per cent.* interest, but also such surplus profits as should arise from these two shares in the business, he

(a) Lord *Chesterfield v. Janssen*, 2 *Wils.* 286.

(b) 2 *Bl. Rep.* 998.

himself

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WILSON.

himself not being bound on the other hand to make good to the partners any part of the losses which the trade might sustain. The simple question is whether this is not an agreement to receive more than the 5*l. per cent.* allowed by law for the forbearance of a loan? Most unquestionably it is; and it is therefore void. It has been argued however that this was not an usurious contract, because the principal was put in hazard, as it was liable to the partnership creditors: but it was no farther hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency; for, as between the plaintiff and the partners in the business, he was not liable to contribute to the losses in the trade.

ASHHURST, J. Where on the face of the contract itself the principal is in hazard, as in bottomry bonds, the lender may reserve more than 5*l. per cent.* interest, without incurring the guilt of usury. But where the principal is secured at all events, and yet more than 5*l. per cent.* may be got by the terms of the contract, it is usurious: and such is the present case.

BULLER, J. In this agreement provision is made to receive the profits, but none to engage for the losses, of the trade. And therefore it is not true that the plaintiff's principal was at stake; since by the terms of the contract the trade is to be carried on by the other partners, and the plaintiff is only liable to make good the losses of the trade in the event of the insolvency of the other partners. But as between these parties, if there be any losses, they must be borne by the defendant and the other partner; and if there be any profit, the plaintiff is to receive his proportion of it.

GROSE, J. declared himself of the same opinion.

Judgment for the defendant.

Thursday,  
June 30th.

GOODRIGHT, on the Demise of TOMPSON, against  
SAUL and Others.

The child of  
a married  
woman may  
be proved a  
bastard by  
other evi-  
dence than  
that of the  
husband's  
non-access.

ON the trial of this ejectment before Ashhurst, J. at the last assizes at *Norwich*, the lessor of the plaintiff made out his title to the premises in question as heir at law to *John Tilyard*, the person last seised, being the nephew of his paternal grandmother. In answer to this the defendants, who were the tenants on the estate, set up the title of *John Turner Hales*, as being the great grandson of *Elizabeth Tilyard*, a sister of the paternal grandfather

*See the King v. Luffe O. East 1793.*



father of the said *John Tilyard*, in whom the estate vested by purchase, under a devise, having been originally derived from the said *Elizabeth's* father, *Robert Tilyard*, and consequently that *Hales* had the superior title. The question therefore turned upon the evidence by which he deduced his legitimate descent from *Elizabeth*. As to which, the defendants did not prove any marriage in fact between her and *Joseph Hales* the great grandfather of *J. T. Hales*; but they produced a pedigree found in the late *John Tilyard's* house, from whence it appeared that *Joseph Hales* the great grandfather and the said *Elizabeth* had had issue *Joseph Hales*, through whom the said *J. T. Hales* derived title, and further that *Robert Tilyard* the father of the said *Elizabeth*, in his will dated 6th November 1714, called her his daughter *Elizabeth Hales*; and several other family wills described the *Hales's* as cousins. Some expressions of the late *John Tilyard* were also proved, acknowledging *J. T. Hales* as his heir at law; but it appeared that these, as well as the pedigree above mentioned, took their rise from the passage in old *Robert Tilyard's* will, wherein he called his daughter *Elizabeth* by the name of *Elizabeth Hales*: and besides there were similar expressions of acknowledgment from the late *John Tilyard* as to the heirship of the lessor of the plaintiff. To counteract this evidence the lessor of the plaintiff proved the marriage of *Elizabeth* in 1705, by her maiden name of *Tilyard*, with one *Simon Kilburn*, with whom she lived in *Norwich* for some time without having any children; that *Kilburn* then left *Norwich*, after which time she and *Hales* lived publicly together as man and wife for some years, during which time that son was born who was stated in the pedigree to be the issue of *Elizabeth* and *Joseph Hales*; and who, it was proved, had always been considered in the family as a bastard. Where the husband was during that time did not clearly appear; but a very old witness said that he went to *London*, where it was supposed he remained; and that he returned to *Norwich* after his wife's death. It was further proved that *Joseph Hales*, the son, mentioned in the pedigree, always went by that name, except in one instance, where he sold an estate after his mother's death, which had been devised to her by her father *Robert Tilyard*, and in the title deeds styled himself "*Joseph Kilburn, otherwise Hales*": and his descendants always went by the name of *Hales*. And it was also proved that *Elizabeth* was buried by the name of *Kilburn*. The fact of her marriage with *Kilburn* being thus clearly established, the defendant's counsel then

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against  
SAUL.



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against  
SAUL.

changed their ground, and contended for the right of *J. T. Hales*, as having descended from that marriage, for that unless non-access of the husband were clearly proved, which had not been nor could be done at this distance of time, it must be taken that *Joseph* the son, whatever his reasons might have been for taking the name of *Hales*, must, in point of law, be taken to be the son of *Kilburn*, and could not be bastardized by mere evidence, that another person had cohabited with his mother from whom he claimed; and the learned judge directed the jury to that effect, telling them that though it was not absolutely necessary to prove the husband out of the realm in order to bastardize the issue, yet it was incumbent on the party insisting upon that fact to prove that the husband could not, by any probability, have had access to his wife at the time; which he conceived had not been shewn in the present instance; whereupon the jury found a verdict for the defendants. To set aside which

*Wilson* obtained a rule *nisi* last term, on the ground that the circumstances given in evidence at the trial were fully sufficient, at this distance of time, to prove the bastardy of *Joseph Hales*, upon whose right the defence was founded; and that it was not indispensibly necessary to prove that by no possibility could the husband have had access to his wife. The will of the father *Robert Tilyard*, in which he calls his daughter *Elizabeth Hales*, the notoriety of *Hales'* cohabitation with her, the probability of the husband's absence during the time, the reputation in the family of the son's being a bastard, and the circumstance of his and his posterity having adopted the name of the putative father, altogether formed ample grounds for the jury to draw the conclusion of his illegitimacy.

*Le Blanc*, Serjt, shewed cause on this day; and began by insisting on the circumstance of the son's having executed in the deed of conveyance soon after the mother's death, under the name of *Kilburn*, which was strong to shew his legitimacy, even independently of the question of non-access. But he was interrupted by

ASHHURST, J. who, after consultation with the rest of the Court, said, that he was of opinion that there ought to be a new trial. He added that he was convinced he had laid too much stress on the necessity of proving non-access, when the husband was within the realm, by witnesses who could prove him constantly resident at a distance from his wife. That



the husband in this case left the wife, and went to reside at another place, as it was believed in *London*, and that there was no direct evidence of his access, he observed was very clear; and then there were other circumstances which went strongly to rebut the presumption of access, and to shew that the son was a bastard; among others a very forcible one occurred, that of the son's having taken a different name from his birth, the name of the person with whom his mother was living at the time, which had been retained by him and his descendants ever since: that was a very strong family recognition of his illegitimacy.

*Per Curiam,*

Rule absolute  
for a new trial without costs.

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GOODRIGHT  
against  
SAUL.

PARTIDGE *against* WHISTON, Clerk.

Friday,  
July 8th.

DEBT on bond. The defendant in his plea craved *oyer* of the condition, which, (after reciting that the plaintiff had presented the defendant to the rectory of *Cranwick* and the vicarage of *Metbwold, Norfolk*, in order that he might be instituted and inducted; that the defendant had agreed to be personally resident in one or the other of those parishes, or in *Northwold*, which is contiguous to them both, without absence for 80 days in any one year, to serve the cure of those two parishes himself, if his health would permit, and not to serve the cure of any other parish while he held this rectory and vicarage; that, as the two livings together were a comfortable provision for one clergyman, though neither of them alone were such, the defendant had further agreed never to resign one without the other; that the plaintiff had a son about 14 years of age, who probably would take orders, and might be desirous of taking these livings, and therefore the defendant had agreed in that event to resign both the livings on three months notice to be given by the plaintiff, in order that the plaintiff's son might be presented thereto;) was that the defendant should perform this agreement, and keep in good repair the rectory house and chancel of *Cranwick*, and the vicarage house of *Metbwold*. He then pleaded that before the execution of the bond, and before presentation &c, it was corruptly, simoniacally, unlawfully, and against the form of the statutes &c, agreed between the plaintiff and the defendant that the former should present the latter

Qu. Whether  
a bond of  
resignation  
with condi-  
tion to reside,  
to resign  
for the pa-  
tron's son to  
be presented,  
and to keep  
the premises  
on the living  
in repair, be  
not good in  
law?

*In my opinion  
on case 29 Aug.  
1811. & inquire  
for late case  
of Sir Henry  
Peyton.*

in



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PARTRIDGE  
against  
WHISTON.

in consideration that, if he should be admitted &c, he would resign the two livings, in case the plaintiff's son took priests' orders and was desirous of taking the livings, in order that the plaintiff's son might be presented &c; and that in pursuance of such agreement, and for securing the performance of the same, the defendant executed the bond &c. In another plea, after stating that these livings were benefices with cure of souls, and ought to be held by clerks for life, freely and without any control of the patron, and that such clerks are not bound by the law of the land to resign such benefices at the request of the patron, he pleaded performance of every part of the agreement, except that respecting his resignation.

To these pleas there was a general demurrer; and joinder.

*The Court*, understanding that it was intended to carry this case up to the House of Lords, gave judgment for the plaintiff, without hearing any argument. They said that, as this was not precisely similar to the case of *The Bishop of London v. Ffytche* (a), they were bound by the established series of precedents to give

Judgment for the plaintiff (b).

*Chambre* was to have argued for the plaintiff; and *Wood* for the defendant.

(a) *Dom. Proc.* May 1783.

(b) *Vid. Bagshaw v. Bosley*, ante 78.

Saturday,  
July 9th.

### DRUMMOND against DORANT and Another.

After demurrer to a declaration of two counts against two defendants, because one of them was not named in the last count, plaintiff cannot enter a *nol. prof.* on that count, and proceed on the other.

THIS was an action on the case against the defendants for building before the plaintiff's house and obstructing his lights; but in the second count only one of the defendants was named. And the defendants having demurred to the declaration, the plaintiff entered a *nolle prosequi* as to the last count. But

*The Court* were of opinion that in this stage of the proceedings the plaintiff could not (a) enter a *nolle prosequi*. They however gave him leave to amend on payment of costs.

*Lawes* in support of the demurrer. *Wigley*, contra.

(a) *H. Black.* 108.



1791.

OAKAPPLE on the Demise of GREEN *against* COPOUS.Saturday,  
July 9th.

ON the trial of this ejectment before Lord *Kenyon*, it appeared that the defendant held from *Michaelmas*, and that he was served with notice to quit at *Midsummer*; but, when he received this notice, he made no objection that it required him to quit at that period of the year, but merely said "I pay rent enough already, and it is hard to use me thus." The defendant's counsel pressed for a non-suit, on the ground that the notice should have been to quit at *Michaelmas*; to which it was answered that the defendant had waved taking this objection when he received the notice, and that he ought not now to be permitted to turn round the lessor of the plaintiff on such an objection. A verdict was taken for the plaintiff, with liberty to the defendant to move to set it aside, and to enter a non-suit, in case the Court should be of opinion that the defendant was not precluded from making the objection.

If notice to quit at *Midsummer* be given to a tenant holding from *Michaelmas*, he may insist on the insufficiency of the notice at the trial, though he did not make any objection at the time when it was served.

This matter being now moved,

The Court were of opinion that the defendant had not waved the objection; and therefore they made the rule absolute to enter a non-suit. And

BULLER, J. added, that whether the defendant had or had not assented to be considered as holding from *Midsummer* would have been a question of fact for the jury, if there had been any evidence on this point; but, that so far from there being any evidence of such an assent at the time when he received the notice, his answer proved the reverse; for it was the answer of an angry man.

Rule absolute.

*Bower* in support of the rule. *Erskine* against it.

CAUDELL *against* SHAW.Saturday,  
July 9th.

THIS action was brought by the plaintiff, a widow, in her own right, for goods sold and delivered by her while she was covert. It appeared on the trial before Lord *Kenyon* that the trade was carried on solely by the wife in *Cheapside*, without the interference of the husband, though he lived in the same house with her. The plaintiff obtained a verdict. The objection made at the trial, and again insisted on in this Court by *Marryat*,

A feme covert cannot sue without her husband as a sole trader by the custom of London in the superior courts at Westminster.



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CAUDELL  
against  
SHAW.

who on a former day obtained a rule to shew cause why a non-suit should not be entered, was that the goods were *prima facie* the property of the husband, and consequently that the wife could not maintain this action in her own right; for that she could not avail herself of the privilege of being a sole trader, according to the custom of *London*, in the superior courts at *Westminster*, such privilege being confined to the city courts. In *Bobun's Priv. of London*, it is said "Feme covert by the custom of *London* shall sue without her husband, as a feme sole merchant, by *Wray*: but the action must be laid within the city. *Chamberlain* and *Sharpe's case*." It also refers to 1 *Ed.* 4. 6; 35 *H.* 6. 38; and 9 *Ed.* 4. 35. In *Moreton v. Packman & Uxor* (a) a *procedendo* was granted to the court in *London* in a suit of the wife as sole merchant in selling ale, in which the husband was not joined; and the Court said they could not try whether selling ale were within the custom; nor would any action lie here against the wife alone; neither would this court take notice of those private customs. Again in *Royston v. Ivory* (b) a *procedendo* was granted on the suit of a feme covert as a feme sole merchant, the custom being alleged in the declaration. But even if a feme covert, who is entitled to the privilege, could in any case sue in the superior courts, she ought to allege in her declaration the custom, on which her right to sue as a feme sole arises. A rule *nisi* was granted, and

BULLER, J. said that this point was decided in this Court in the year 1773; and he read the following note, "*Read v. Frances Jewson*, *H.* 13 *G.* 3. *B. R.* Mr. *Cowper* and Mr. *Buller* shewed cause last term against a rule obtained by the assignees of the defendant, who was a bankrupt, for setting aside a judgment and execution had thereon. It appeared that the defendant was the wife of one *Charles Jewson*, and was a sole trader by the custom of *London*; and that being indebted to the plaintiff in 9000 *l.* she entered into a bond, in which she was described "milliner, citizen, and sole trader"; and also executed a warrant of attorney to enter up judgment on the said bond, which was entered up accordingly, and a *fieri facias* sued out, and the defendant's goods taken in execution. In the judgment it was stated that the defendant was a feme covert, sole trader; and that the money (mentioned in the bond) was advanced to the defendant touching her craft. The objections to the judgment taken by Mr. *Wallace* and Mr. *Davenport*, in support of

(a) 2 *Keb.* 583.(b) 3 *Keb.* 302.



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the rule, were that the judgment was irregular, it not being entered pursuant to the authority; that the husband ought to have been impleaded jointly with the wife, though execution must be against the wife only; and that the action was not maintainable in this court, but ought to have been brought in the court of the city of *London*: and they said that *Wilmot*, J. and *Yates*, J. laid it down upon a former occasion, that an action founded on the custom of *London* (like the present) must be brought in the courts of the city of *London*, and no where else; and they urged that if the court could not give relief to the assignees (who were now interested in the question) upon motion, they would be without remedy; for though a writ of error would lie, yet the husband must join, and the assignees could not compel him so to do. *The Court* said this was a new case; that the husband alone could be prejudiced by the judgment, and had a right to bring a writ of error to reverse it; but if he acquiesced, they were inclined to think the judgment ought to stand; however they ordered it to stand over to hear what the husband said. This matter coming on again this term, and the husband appearing, and declaring he consented to the motion, Lord *Mansfield* observed that this was an application to set aside a judgment entered *up without authority*. In the bond the defendant is called "milliner, citizen, and sole trader"; but no mention is therein made for what the debt is. The warrant of attorney is to confess judgment on that bond, and judgment is confessed on a long declaration, stating several facts not mentioned in the bond, as the custom of *London* respecting a feme covert sole trader, and that the money mentioned in the bond was advanced to the defendant touching her craft; therefore there is no authority to enter up the judgment in the manner in which this is entered. No instance hath been shewn where a feme covert sole trader can execute a bond; she is liable to simple contract debts, but cannot give a bond; if she could, she might bind her heirs, if she had real assets, which certainly no custom can warrant. An infant is liable for necessities, but cannot give a bond for them. A married woman cannot be made defendant without her husband; and if she cannot, (and no case has been cited to shew she can) she cannot give a warrant of attorney to confess a judgment. The mode of execution is a commitment to prison, though judgment is against the goods. This judgment is entered up without authority, and must be set aside. *Aston*, J. The custom seems to operate on simple



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simple contracts only. By the better authority, it seems that the action must be brought in the city courts; and the husband ought to be joined. It is a principle of the common law (*Finch* 12.) that a woman shall never be put to answer without her husband. Indeed in a note in *Dyer* 271. b. it is said where a husband was banished, the wife was suffered to appear alone to prevent her being waved. The warrant of attorney in the present case is an absolute nullity. *Willes* and *Ashurst* Justices agreeing, the rule was made absolute for setting aside the judgment, *as entered up without authority*; and a clause was ordered to be inserted in the rule that the husband being present in court consented to the motion. N. B. Mr. *Cowper* and Mr. *Buller* pressed much that the husband should be put to bring his writ of error."

*Mingay* and *Manley*, in shewing cause on this day, observed that this action was not brought by a *feme covert*, the husband having died before the action was brought; and they assimilated this to the case where a feme sole, entitled to a *chose in action*, marries, and afterwards the husband dies without reducing it into possession, in which case it would survive to the wife. But

*Per Curiam*. In the case put at the bar, of the *chose in action*, the right survives to the wife by the common law of the land. But here the right claimed by the wife only arises by the custom of the city of *London*, of which we can take no notice in this action; and therefore the action should have been brought by the representatives of the husband. The cases in 2 *Leon*. 166; and *Moor* 135; shew that the superior courts at *Westminster* cannot take notice of this custom.

Rule absolute.

Saturday,  
July 9th.

HOUGHTON against BUTLER and Another.

If to an action of trespass for pulling down and carrying away a gate the defendant plead a right of way, and that the gate being wrongfully erected across the

same he took it down and deposited it in a convenient place for the use of the plaintiff, to which the plaintiff replies a subsequent conversion; proof that the defendant put the gate upon his own premises, from whence the plaintiff might have taken it, if he had pleased, will not sustain the replication.



the said place where the said iron gate had been erected, *for the use of the plaintiff, &c.* Replication, protesting that the defendants did not after they had broken down the said gate remove the same to a convenient distance from the place where it had been erected &c, alleges that after the breaking down &c, the said iron gate in manner and form as the defendants have pleaded, they *converted* the same to their own use, &c. Rejoinder taking issue thereupon. At the trial at the last sittings at *Guildhall* before Lord *Kenyon*, it appeared that the gate in question having been erected across a way, the right of passing over which was claimed by the defendants, they had taken it down, and laid it on their own side of the premises which joined to the plaintiff's close by the place where it had been erected, and from whence the plaintiff might have taken it whenever he pleased. No access was proved; but his Lordship inclined to think that the defendants' putting down the gate on their own premises, where the plaintiff had no right to come, was a conversion in point of law; and the plaintiff recovered a verdict: which

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*Bower* moved to set aside, on the ground that the putting of the gate on the premises of the defendants was not of itself a conversion so as to make them trespassers *ab initio*; for it amounted to a license to the plaintiff to enter, and take it away; according to what is said in 2 *Roll.* 565. *pl.* 9. that "if a man take my goods and carry them upon his own land, I may justify entering upon his land to take them again, for they came there by his own act." *Bro. Abr. "Trespass"* *pl.* 186. The replication put the right of way entirely out of the question, and therefore the plaintiff could only make the defendants trespassers *ab initio* by proving an excess in the manner of doing the act, or an assumption of right to the gate by them; neither of which appeared.

*Erskine* now shewed cause. It was not necessary to shew any excess here in the manner of pulling down the gate; but the plaintiff relied in his replication upon an independent conversion afterwards, which was proved by the defendants having carried the gate upon their own premises. That was an assumption of right in them, which made them trespassers.

*Bower* and *Lambe* in support of the rule were stopped by

*The Court*, who were clearly of opinion that the plaintiff had not made out his case. The defendants pleaded a right of way, and that, the gate having been wrongfully erected across it, they removed it, and deposited the same in a convenient place *for the*



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*use of the plaintiff.* The plaintiff did not deny these facts, but replied a subsequent conversion: it was therefore incumbent upon him to prove some trespass, which was not covered by the plea, and that he has not done.

Rule absolute.

Thursday,  
June 30th.

BERRYMAN, one, &amp;c, against WISE.

In an action by an attorney for words spoken of him in his profession, he need not prove that he is an attorney by his admission, or by a copy of the roll of attorneys; proof that he acted as such is sufficient.

THIS was an action of slander by an attorney. The declaration stated that the plaintiff was an attorney of this Court, and having been employed in a particular cause had received a certain sum of money, which the defendant charged him with swindling, adding a threat that he would move the Court to have him struck off the roll of attorneys. At the trial at the last York assizes before Thomson, B. the plaintiff proved the words, and his having been employed as an attorney in that and other suits. The defendant's counsel objected that the plaintiff had not proved the first allegation in the declaration, namely, that he was an attorney of this Court, which could only be proved, by his admission, or by a copy of the roll of attorneys: but the objection was over-ruled, and the plaintiff obtained a verdict, the learned judge reserving the point, with liberty to move to enter a non-suit.

Wood accordingly renewed his objection in the last term, and obtained a rule to shew cause why a non-suit should not be set aside; which was now opposed by

Law; who said that, the substantial allegation being that the plaintiff was an attorney of one of the superior courts of Westminster, it was immaterial whether he were admitted by one Court or the other. And that the charge itself, which the defendant had made, admitted that he was an attorney.

The Court were of opinion that this was sufficient proof, for the defendant's threat imported that the plaintiff was an attorney. And

BULLER, J. said that in the case of all peace officers, justices of the peace, constables &c, it was sufficient to prove that they acted in those characters, without producing their appointments, and that even in the case of murder (a). The excise and custom-house officers indeed fall under a different consideration:

(a) So determined by all the judges in Northampton Spring assizes in 1789. the case of Gordon, who was tried at the

but



but even in those cases evidence was admitted both in criminal and civil suits to shew that the party was a reputed officer prior to the 11 Geo. 1. c. 30. §. 32. In actions brought by attornies for their fees, the proof now insisted on has never been required. Neither in actions for tithes (a) is it necessary for the incumbent to prove presentation, institution, and induction; proof that he received the tithes, and acted as the incumbent, is sufficient.

Rule discharged (b).

(a) *Vid. Bevan v. Williams*, ante 3 vol. 635. n. a.

(b) *Vid. Radford v. McIntosh*, ante 3 vol. 632.

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VAUGHAN against DURNELL.

Monday,  
July 11th.

THE writ of *capias ad satisfaciendum* in this case, on which the defendant was taken in the vacation, was sued out in the last long vacation, returnable the first return of *Michaelmas* term, but he escaped from the custody of the officer who arrested him, and was not retaken till the 20th of *November*, when he was carried to the *Marshalsea* prison. In *Hilary* term last he applied to be brought up under the Lords' act before Mr. Justice Buller at chambers, for the purpose of obtaining his discharge; but as there was a mistake in the notice given to the plaintiff as to the name of the cause, he was remanded.

*Garrow* now moved that the prisoner might be brought up to the Court, in order that he might take the benefit of the Lords' act. He said that, if the Court should be of opinion that for so trifling a mistake in the notice the defendant ought not to have been remanded, the present application was in time, because it must be considered as having been made in *Hilary* term, which was the term next after that in which he was charged in execution; and by the 32 Geo. 2. c. 28. §. 13. "any prisoner may, before the end of the first term which shall be next after any such prisoner shall be charged in execution, petition &c." And he contended that the prefixing of the wrong title to the notice, even in its present shape, ought not to be conclusive against the prisoner, since it had the effect of giving notice to the plaintiff of that which he was to oppose.

*Gibbs* opposed this application in the first instance; observing that the notice was calculated to mislead the plaintiff, as it was entitled in another cause, and consequently that the learned judge did right in remanding the prisoner. But whether it

If a defendant be arrested on a *ca. sa.*, and escape, and be afterwards retaken and committed to prison in the next term, he may apply in the following term to be discharged under the Lords' act; for the words in that statute "charged in execution" mean being detained within the walls of the prison.



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were so or not he said was perfectly immaterial in this case; because even if this application were considered as having been made in *Hilary* term, it was too late, since he was taken in execution in the last long vacation, and consequently should have applied for his discharge in the *Michaelmas* term following. By the sheriff's return that the prisoner was taken under the writ returnable the first return of *Michaelmas* term, the defendant must be considered as charged in execution at that time. From that moment the sheriff was answerable for the person of the defendant. And it would be permitting the defendant himself to take advantage of his own wrong, if, by escaping out of the custody of the law, he could enlarge the time of his applying to be discharged under this act of parliament. But

*The Court* thought the application was made in time, for that the defendant could not be said to be *charged in execution*, within the meaning of this act, until he was actually delivered over to the marshal. And that the 26 *Geo. 3. c. 44. s. 4.*, which was made in *pari materia*, contained a parliamentary exposition of the words "charged in execution" in the Lords' act; for it directs "all gaolers and keepers of prisons to give notice of that act to all persons in their custody for debt, within three days after such person shall have been respectively committed or charged in execution." They therefore ordered the defendant to be brought up, and recommended it him to amend the title to the notice.

Tuesday,  
July 12th.

The KING against NEWCOMB and Another.

If a poor-rate be not published in the church on the Sunday next after it is allowed, it is a nullity; and payment under it cannot be enforced, though there be no appeal to the Sessions.

A Rule having been obtained, calling on the defendants, who were justices for *Devon*, to shew cause why a *mandamus* should not issue to compel them to grant a warrant of distress on *D. Simpson* of *Halberton*, to levy a poor-rate, cause was now shewn by

*Dampier*; who said that as the rate was not published till the third Sunday after it was made, it was a nullity; for it is enacted by the 17 *Geo. 2. c. 3. s. 1.* that public notice shall be given of every rate the next Sunday after it shall have been allowed by the justices, "and that no rate shall be esteemed valid and sufficient, so as to collect and raise the same, unless such notice shall have been given." And notwithstanding there was an appeal to the sessions against this rate on the ground of inequality, where the appeal was dismissed, the order of sessions cannot give effect to that rate, which was before a nullity. 1



*Fanshawe*, in support of the rule, contended that as the object of the act of parliament in requiring the public notice of the rate to be given in the church was to guard against secret and clandestine rates, it was answered in this case by publishing it in the church on the third *Sunday*, which was equally notorious to the inhabitants of the parish as if it had been published on the first *Sunday* after it was made. But even if it were an objection at first, it was the ground of an appeal; whereas the rate was appealed against on another ground, and confirmed. And in *Hutchins v. Chambers* (a), Lord Mansfield said "A defect in the rate, unappealed from, could not avoid the warrant (of distress)." At all events the writ ought to go, that the defendants may be compelled to put the answer on the record; as was done in *R. v. The justices of Middlesex* (b), where Lee, Ch. J. said "If the justices have sufficient reason why they did not grant the warrant, it will appear upon the return to the *mandamus*."

LORD KENYON, Ch. J. There is no doubt but that in a proper case this Court would grant a *mandamus* to compel the justices to grant a warrant of distress, because without it payment of the rate could not be enforced. But as the *mandamus* would be no justification to the magistrates, we must take care not to compel them to do an act, which may not be warranted by law. Now this application is answered by the act of parliament, which requires a particular step to be taken, before the rate can be valid, namely, that public notice shall be given of the rate in the church on the next *Sunday* after it is allowed; that direction was not pursued in this case, and consequently the rate itself is invalid. Supposing the parish officers were to give notice of the rate at some other public place in the parish, it would not be sufficient, though it might be equally notorious. What is said in *Hutchins v. Chambers* is perfectly right, as applied to the inequality of the rate. But this is a radical defect in the rate itself, which nothing can cure.

BULLER, (c) and GROSE, Justices, concurring.

Rule discharged (d).

(a) 1 Burr. 587.

(b) Bott 50. pl. 73.

(c) Abf. Ashurst, J.

(d) Vid. *Milward v. Caffin*, 2 Bl. Rep. 1330.



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Tuesday,  
July 12th.ONEALE *against* PRICE.

Plaintiff cannot sign judgment for the defendant's refusing to pay 4*d.* for the warrant of attorney when the copy of the declaration is delivered to him.

WHEN the plaintiff's attorney delivered the copy of the declaration to the defendant's attorney, he demanded a gross sum for the warrant of attorney and for the copy of the declaration, and signed judgment on the latter refusing to pay, on the rule of court of the 5 *Ann*; by which it is ordered "that the defendant's attorney, at the time of the delivery of the copy of the declaration, or taking thereof out of the office, shall pay 4*d.* for the warrant of attorney; and if he refuse, the plaintiff's attorney may sign judgment against the defendant in such action, by default."

*Gibbs* obtained a rule on a former day to shew cause why this judgment should not be set aside for irregularity; on the ground that the rule of the 5th of *Anne* had never been acted upon; and that, if it were still in force, it should be taken strictly, and the plaintiff's attorney ought to have made a separate demand of the 4*d.*; whereas he included it in another, and a larger, sum, for non-payment of which he was not entitled to sign judgment.

*Shepherd*, in support of the rule, admitted that the plaintiff could not sign judgment on account of the defendant's not paying for the copy of the declaration; but said that, notwithstanding the whole sum had been demanded together, the defendant's attorney should at least have paid for the warrant; for that the rule of the 5th of *Anne* still continued in force. But

*Per Curiam.* There is no instance in which judgment has been signed for not paying for the warrant of attorney; at least in modern times. The practice has been to make a demand for the warrant and the copy of the declaration together; and it is admitted that for not paying for the latter judgment could not have been signed.

Rule absolute.

Wednesday,  
July 13th.WALLACE *against* The Duchess of CUMBERLAND.

If defendant, after craving *oyer* of a deed, do not set forth the whole deed, the plaintiff

DEBT on bond. The defendant, after craving *oyer* of the bond and condition, set out in her plea the condition, omitting the reciting part which preceded the condition, on which the plaintiff may sign judgment as for want of a plea; or the Court will quash the plea.



*Wood* moved on a former day to quash the plea, because it did not contain a true recital of the whole of the condition. It was now opposed by

*Erskine*, and *Baldwin*; who said that the recital which preceded the condition was wholly immaterial, since the condition itself expressed every thing that was contained in the recital; and that if the plaintiff thought it material, he might set it forth in his replication. But, if the Court thought it necessary that it should be set out in the plea, they prayed leave to amend. But

The Court said that by craving *oyer* the defendant undertook to set out in her plea the whole condition, including the recital, in so many words; and that, not having done so, the plea was bad. That the plaintiff would have been warranted in signing judgment as for want of a plea; and that though in this case no time (a) was gained by the defendant's attempt, yet in most cases a false recital was made for the purpose of delay. And therefore, to prevent a similar attempt in future, they would not permit the defendant to amend.

Rule absolute (b).

(a) It appeared that the plaintiff had not lost a trial.

(b) *Ferguson*, Bart. and others v. *Mackreth*, H. 24 Geo. 3. B.R. To an action of debt on bond, the defendant after craving *oyer*, set it out truly, and pleaded payment by the principal, he being a surety. Plaintiff replied, and put the pleas in issue, and then served the defendant's attorney with a rule to abide by his pleas, and gave notice of trial. The defendant returned the paper-book; setting out a false *oyer* of the bond, and pleading as before. On which the plaintiffs enrolled the true condition, and demurred.

On the day of argument, which was the last paper day of the term, the defendant's counsel objected to it's being argued, because it was the last paper day. But

The Court, on hearing the above facts stated, directed an affidavit of them to be made; made a rule nisi for striking out all the pleadings of the defendant, that the plaintiffs should have judgment; and that the defendant's attorney should pay all the costs. And they intimated a strong inclination to grant an attachment against him.

*Burrough* for the plaintiffs. *Law* for the defendant.

### The KING against The Inhabitants of HINCKLEY.

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July 13th.

THE pauper, *T. Furborough*, was born at *Frowlesworth*, (where his father was legally settled,) and at 9 years old was bound a parish apprentice to *D. Palmer* of *Hinckley*, who was residing at *Hinckley* under a certificate from *Copson*, in the county of *Warwick*. The pauper, after serving part of his time with *Palmer*, was assigned by him to *J. Hurst*, a legal parishioner of *Hinckley*, under an agreement, by which *Hurst* was to pay 1s. a week to *Palmer*, and which sum was paid accordingly. He

If an apprentice to a certificate person be assigned to a second master in the same parish, he cannot gain a settlement in that parish by serving the second master.

served



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served *Hurst* in *Hinckley* above 40 days before he left him. The Sessions, being of opinion that the pauper gained a settlement by serving *Hurst* under the assignment of the indentures, confirmed the order, by which he and his wife were removed from *Frowlesworth* to *Hinckley*.

*Bearcroft*, *Le Blanc*, Serjt., *Perceval*, and *Torkington*, being called upon (a) to support the rule to quash the order of Sessions, contended that the pauper acquired no settlement in *Hinckley* under the assignment of the indentures of apprenticeship, whether the case were considered on the words of the statute of 12 Ann. st. 1. c. 18; or on the construction which they have received. The second section of that act, after reciting that certificated persons frequently take apprentices, who by reason of such apprenticeships gain settlements in, and become a burden to, such parishes, though such masters have no settlements there, enacts, that if any person, who shall be an apprentice, bound by indenture to any person who shall reside in any parish by means or license of such certificate, and not afterwards having gained a legal settlement in such parish, such apprentice by virtue of such apprenticeship, indenture, or binding, as aforesaid, to such person, shall not gain any settlement in such parish, by reason of such apprenticeship or binding." The object of the act therefore clearly was to prevent any consequential burden being brought on the certificated parish by the person residing there under the certificate. In *R. v. Romsey* (b), where an apprentice with the consent of his master served a second master, who was residing in another parish under a certificate, it was held that the apprentice gained no settlement in the second parish; and *Yates*, J. said "The intention of this act is that a certificate man shall not be the instrument of the apprentice's gaining a settlement in the parish to which he himself came by certificate." In the same case, as reported in *Bott* 135. pl. 243. *Aston*, J. said, "if he had been assigned by a certificate person to a third person, he might gain a settlement; for *third parties* are not within the certificate act." But "third parties" do not mean *third masters*, but *third parishes*. For in *R. v. Petham* (c), where a certificated person from *Petham* to *Lydd* was bound to a person living at *Tenderden*, who himself was certificated from *Sellinge*, and was afterwards assigned to a second master living at *Lydd* whom he served 40 days, the Court held that he gained a settlement in *Lydd*, because third parishes are not within the certificate act. *Lee*, Ch. J. there said "The

(a) In last Easter term.

(b) *Burr. S. C.* 640.

(c) *Bott.* 130. pl. 238.



end of that act seems fully answered by securing the parish which is obliged to receive the certificate man; and there is no reason to extend it farther." If it be said that an assignment operates as a new binding, it may be answered that an assignment is only an agreement between the two masters that the apprentice shall serve the second, instead of the first, master. In legal language, an apprentice cannot be assigned; *R. v. Gbannel*, 3 *Keb.* 519; though he may work for another master by the order or consent of the first; and in such case the service is considered in law as a service to the first master under the indenture of apprenticeship. *St. Olave and All Hallows*, 1 *Seff. Cas.* 215; and *R. v. Petrox*, *Burr. S. C.* 248. But in this case, this was not only a service to the first master in law, but in point of fact also; for he received a weekly benefit from the pauper's labour. Perhaps it may be contended that this is not within the mischief of the act, because the second master might originally have taken the apprentice; but an equitable construction of the poor-laws is not to be favored; and the Court has frequently seen the mischievous effects of departing from the strict letter of them. In these cases the two points to be considered are the binding, and the inhabitancy of the apprentice: now here was a binding to a certificated person, and a residence and service by the apprentice in the same parish where the certificated person resided.

*Bower*, *Dayrell*, and *Gally*, *contra*, said that an assignment of an apprentice had always been considered as a new binding, for the purpose of giving him a settlement; and that he gained a settlement by serving under it for 40 days, if the second master were capable of conferring one. In *R. v. Petbam*, which has been cited, the pauper gained a settlement by serving under an assignment from a certificated person; and according to Sir J. *Strange's* (a) report, who argued the case himself, the Court said "The act has not made the binding void, but has only taken away one of the consequences of such binding for the sake of the certificated parish. *It never intended to meddle with the case of a legal parishioner's apprentice; and when once there is an assignment to such an one, it is the same as if it had been an original binding.*" The principle therefore is not that the apprentice gains a settlement under the indenture; for if it were, the pauper in that case could not have gained a settlement under it. And it is observable that Sir J. *Strange* abridged that case thus,

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(a) 2 *Str.* 1147.



1791. *The King against The Inhabitants of Hinckley.* "A certificate man's apprentice, being assigned to a parishioner, gains a settlement." *The King v. Romsey*, which has also been cited, rather shews that this pauper gained a settlement in *Hinckley*, by considering the effect of a service to the second master; for if the service in that case had been considered as performed to the first master, it would have been immaterial to consider whether the second master were a certificated person or not, and the pauper should have been settled at *Romsey*. And in the report of the same case in *Bott*. *Aston J.* put this identical case, "If he had been assigned by a certificate person to a third person, he might gain a settlement; for third parties (not *parishes*) are not within the certificate act (a)". In the cases which have arisen on this statute, the Court has not enquired into the situation of the parties at the time of the original binding, but when the service is performed. *R. v. Westbury*. And it is sufficient for the purpose of giving a settlement, that the master (whether the first or second) is capable of conferring a settlement at the time when the service is performed. If the first master, instead of assigning the apprentice to the second, had discharged his certificate, and gained a settlement in *Hinckley*, the apprentice would have acquired a settlement there by serving under the indenture; *Ivinghoe v. Stonebridge*, 1 *Str.* 265, and yet originally the binding was to a certificate man (b). Then it can make no difference whether the service be performed to one person or another, provided that person be capable of conferring a settlement. Neither is the parish of *Hinckley* injured by the pauper's gaining a settlement there by serving the second master; because it was competent to such second master to have taken the apprentice originally; or the first master might have given up the indentures when he assigned the apprentice, and the latter might then have been bound to the second master for the remainder of the time, as an original binding: and in neither of those cases is it disputed but that the pauper would have gained a settlement in *Hinckley*. It may be admitted that some confusion has crept into the cases from considering the legal effect of the assignment of an apprentice: but it is merely a technical answer to a technical objection; and all the cases shew that an assignment has the same effect, with regard to giving a settlement, that the original binding has.

(a) It was also said that a MS. note of this case agreed with *Bott's* report. for in the certificate act, "and not afterwards having gained a legal settlement in

(b) This situation is particularly provided for in the certificate act, "and not afterwards having gained a legal settlement in such parish."



*The Court* took time to consider of this question; and on this day

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The King  
against  
The Inhabi-  
tants of  
HINCKLEY.

Lord KENYON, Ch. J. delivered the unanimous opinion of the Court. The question in this case is whether any settlement was obtained by the apprentice by his service under his second master, who was a parishioner of *Hinckley*, in that parish, his first master by whom he was assigned having been certificated thereto. The first impression made upon my mind was that, as the last forty days of the apprenticeship were served under a person who was not under the disability of the certificate, such service gained a settlement: but upon looking more fully into the authorities cited, on which I had formed my first opinion, and advertent more particularly to the words of the statute of *Anne*, I am disposed to think that a settlement was not acquired by the service under the indenture with the second master in *Hinckley*, although he were not residing there under the certificate. And that opinion which we have formed proceeds principally on the words of the statute of *Anne*, and the view with which it was passed. By the general tenor of the certificate act persons settled in one parish, bringing a certificate with them into another, have a right to remain there until they become chargeable; and the parish to which such certificate is granted cannot refuse to receive them. But the mischief was that though the certificated persons themselves could not gain a settlement in that parish, yet they were the means of conferring settlements on others, by taking servants and apprentices, which was thought to be a great hardship on those parishes, who were bound to receive them under the certificate. Therefore to provide against that inconvenience the 12 *Ann. st. 1. c. 18.* was passed; which, after reciting the 8 & 9 *W. 3. c. 30.* and that “many persons obtaining and bringing such certificates do frequently take apprentices bound by indenture, and hire and keep servants by the year, who by reason of such apprenticeships and services do gain settlements in, and become a great burthen to, such parishes &c., though such masters coming with such certificates have by virtue thereof no settlements in such parishes” &c., for remedy it enacts “that if any person whatsoever, who shall be an apprentice bound by indenture to, or shall be a hired servant to, or with, any person whatsoever, who did come into or shall reside in any parish &c., by means or license of such certificate, and not afterwards having gained a legal settle-  
ment



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“ment in such parish &c, such apprentice *by virtue of such ap-  
prenticeship, indenture, or binding*, and such servant by being  
“hired by, or serving as a servant as aforesaid to, such person,  
“shall not gain or be adjudged to have any settlement in such  
“parish &c, *by reason of such apprenticeship or binding*, or by reason  
“of such hiring or serving therein: but every such apprentice  
“and servant shall have his and their settlements in such parish  
“&c, *as if he or they had not been bound apprentice or apprentices,*  
“or had not been an hired servant or servants to such person as  
“aforesaid”. There has never been any precise determination  
on this point; and therefore we think it better to abide by the  
words of the act, from whence the intention of the Legislature  
can best be collected. And the act having expressly provided  
that persons bound apprentices to certificated men shall not *by  
virtue of such apprenticeship, indenture, or binding*, gain a settlement  
in *such parish*, it is necessary that the *binding* should be such as  
would be capable of conferring a settlement by service under  
the original master in that place, otherwise no settlement can be  
gained there by virtue *thereof*. For the Legislature intended  
that no act whatever of this sort done by a certificated man  
should help to bind the parish. As to the case of *The King v.  
Petbam* (a), where it was held that the apprentice of a master  
certificated to *Tenterden* might gain a settlement under an as-  
signment to a second master residing at *Lidd*, which was a third  
parish; that does not govern the present; because it does not  
interfere with the policy of the statute of *Anne*; for the parish  
of *Lidd* had not received the original master by force of the cer-  
tificate, and therefore had no right to avail themselves of the  
provisions of that statute, which was intended for the protection  
of the certificated parish. But here the words of the statute  
cover *Hinckley* in the broadest manner to prevent any burthen  
coming on that parish on account of their obligation to receive  
the certificated person. The other case principally relied on,  
of *Romsey* parish (b), has no application to the present question;  
for though it was contended generally at the bar that the statute  
of *Anne* was confined to apprentices bound by indentures to cer-  
tificated masters, and claiming settlements by serving under such  
original masters, yet the Court by no means adopted that argu-  
ment, but decided rather on the ground that no settlement could  
be gained by the apprentice through the medium of a certificated

(a) 2 Str. 1147.

(b) Burr. S. C. 640.



person in that parish. Therefore as there has been heretofore no determination on this point, as the statute of *Anne* was passed for the express protection of the certificated parish, and as the words of the act are very particular and positive in favour of that parish, we see no reason to restrain the meaning of them to a service with the original master.

Both orders quashed.

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FRAMPTON against BARBER.

Wednesday,  
July 13th.

THIS was an action by original, to which bail were not put in till two days after the *quarto die post* of the second return of the term. On which the plaintiff took an assignment of the bail bond.

Where the action is by original, the defendant has till four days after the *quarto die post* to put in bail.

*Shepherd* moved to set aside the proceedings on the bail bond, on the ground that the defendant had till four days after the *quarto die post* to put in bail.

*Baldwin* contended that the practice was to allow only four days in *London* and *Middlesex*, exclusive of the day of the return of the writ; and cited 1 *Crompt. Pract.* 57.

*Shepherd* said that was where the action was by bill; whereas this was by original, in which case the defendant had eight days. And

The Court, after consulting with the Master, assented to the distinction, upon the authority of *Brownell v. Taylor, Mich. 6 Geo. 3.* to which the Master referred them.

Rule absolute.

KINDER against WILLIAMS.

Wednesday,  
July 13th.

THE defendant was arrested upon process out of the Sheriff's Court of *London*, while he was attending commissioners of bankrupts as a creditor of a bankrupt to prove a debt. He afterwards removed the cause by *habeas corpus* into this court; and now *Holroyd* on his behalf moved the Court that he might be discharged out of custody, on the ground of his being privileged from arrest during his attendance before the commissioners for the cause above mentioned. He said it

The Court will not discharge a person in custody by process of the sheriff's Court in a cause afterwards removed into this court, because he

was arrested while attending commissioners of bankrupt to



1791. *KINDER against WILLIAMS.* had been often held that parties to a cause in the superior courts were privileged from arrest during their attendance in the progress of it, *cundo, morando, et redeundo*; and the same reason extended to exempt during their attendance on any inferior jurisdiction. Commissioners of bankrupts are to be considered as a court for this purpose, being invested with the exercise of judicial powers. And as the creditors are obliged to attend personally to prove their debts before them, except under the 5 Geo. 2. c. 30. s. 36, where they live remote from the place of meeting [which was not the case here, the defendant living in London] when it may be done by affidavit, there is the greater reason for extending the same protection to them. But

*The Court* refused the application; saying that the general rule was founded on the contempt of the Court by the arrest of persons who were giving their necessary attendance upon it. Here the contempt, if any, was to the commissioners of bankrupts, and not to this Court; and even the process under which the arrest was made was sued out of another court; and it could not vary the case that the cause was afterwards removed hither by the defendant. Nor were they satisfied that the commissioners of bankrupts could be considered as a court of justice, or could afford any relief in the premises; but certainly there was no pretence for this court to interfere.

Rule refused.

#### E R R A T A.

Page 295. l. 2. for "*Lawing*" read "*Laming*"

297. n. l. 8. from bottom for "*superadding*" read "*superadded*."

305. l. 20. for "*mother*" read "*mothers*"

307. l. 20. for "*his*" read "*their*"

311. l. 7. after "*of*" read "*the law in*"



*The two following Rules of Court were made in this Term.*

*Tr. 31 Geo. 3.*

**IT IS ORDERED** That from and after the last day of this term, where any sheriff, before his going out of office, shall arrest any defendant, and a *cepi corpus* shall afterwards be returned, he shall and may within the time allowed by law be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted.

*Tr. 31 Geo. 3.*

**IT IS ORDERED** That from and after the last day of *Michaelmas* term next ensuing, no attorney who shall be retained or employed as a writer or clerk by any other attorney, shall during the time of such employ take or have any clerk under articles; and that no service to any such attorney under articles during the time that such attorney shall be so employed by any other attorney, shall be deemed good service. **AND IT IS FURTHER ORDERED** That from and after the same last day of *Michaelmas* term, no person, who shall enter into articles with an attorney or attornies, shall be at liberty to serve the agent or agents of such attorney or attornies under such articles for a longer time than one year of his clerkship; and that any such service to an agent or agents beyond that time shall not be deemed good service. And to the intent that better information may be obtained, touching the fitness and qualifications of persons applying to be admitted attornies, **IT IS FURTHER ORDERED** that from and after the same last day of *Michaelmas* term, every person who shall intend to apply for admission as an attorney in this court, and who shall not have  
2
been



been admitted an attorney or solicitor of any other court, shall for the space of one full term, previous to the term in which such person shall apply to be admitted, cause his name and place of abode, and also the name or names and place or places of abode of the attorney or attornies to whom he shall have been articled, written in legible characters, to be affixed on the outside of the Court of King's Bench, in such place as public notices are usually affixed, and also in some conspicuous place in the chambers of each of the judges of this court, and in the King's Bench Office; and that no person, who shall not have regularly complied with this Order, shall in future be admitted an attorney of this court.

#### The END of TRINITY TERM.



C A S E S

1791.

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Thirty-second Year of the Reign of GEORGE III.

The KING *against* SHEPHERD, and Others.

Tuesday,  
Nov. 8th.

**D**AYRELL moved for an information in nature of a *quo warranto*, calling on the defendants to shew by what authority they claimed the office of churchwardens of *Newark upon Trent*, on affidavits which impeached their election; and he mentioned an instance in the year 1782, when a similar application had been successful.

The Court will not grant a *quo warranto* information to try the validity of an election to the office of churchwarden.

Lord KENYON, Ch. J. said that, had it not been for the case cited, he should not have been disposed to grant a rule even to shew cause. For that this was not an usurpation on the rights or prerogatives of the crown, for which only the old writ of *quo warranto* lay; and that an information in nature of a *quo warranto* could only be granted in such cases. And he observed that the case in 1782 passed by the consent of both parties, who were equally desirous of having an issue directed to try the validity of the election; for which reason the counsel, who were to have opposed the rule, declined objecting to the novelty of the application. He added however that as such a rule had been made in that case, he thought it too much to say, that this question should not be discussed on shewing cause against the rule; and on that ground only a rule to shew cause was granted. But on the next day he said



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against  
SHEPHERD.

*The Court* were of opinion that they ought not to listen to the application, for that it was destitute of every legal principle. That the Court refused to grant such an information in *The King v. Dawberry (a)*. And that in this case even a rule to shew cause ought not to be granted, lest it should be hereafter drawn into precedent like the case in 1782.

Rule refused.

(a) 2 *Stra.* 1196. but more fully reported in *Bott. pl.* 107.

Friday,  
Nov. 11th.

LORD CAMDEN and Others *against* HOME. In Error.

The Prize Courts, and Courts of Lords Commissioners of Appeals, have the sole and exclusive jurisdiction over the question of prize or no prize, and who are the captors, notwithstanding any of the prize acts: and if they pronounce a sentence of condemnation, adjudging also who are the captors, the courts of common law cannot examine the justice or propriety of it, even though perhaps they would have put a different construction on the prize acts. And the same courts have power to enforce their decrees. Therefore where the Lords Com-

missioners had issued a monition after sentence to a navy agent, employed by persons supposed to be entitled to the prize, requiring him to bring the produce of it into court to be distributed among the persons declared to be intitled by their sentence, this Court refused to grant a prohibition.

**E**RROR from the *Common Pleas* in prohibition. The declaration (after reciting that all pleas of and concerning the construction of the laws and statutes of this realm, and the cognizance of such pleas ought to be tried and discussed in the courts of common law, and not in any court proceeding by any law differing from the common law of this realm, and that the court of the commissioners of appeals proceeds by some law differing from the common law, and therefore has no power or authority to try or discuss the validity, construction, or exposition, of any statute, or to expound it otherwise than is allowed by the common law) recited the *Dutch prize act*, 21 *Geo. 3. c. 15*; by which it is enacted, for the encouragement of the officers and seamen of his majesty's ships of war, and the officers and seamen of all other *British* ships, having commissions and letters of marque &c, that the flag officers, seamen, and soldiers on board the king's ships, should have the sole interest and property in all prizes which they should take during the hostilities, after the same should have been finally adjudged lawful prizes to his majesty, in any of the courts of admiralty, to be divided in such proportions as the king by his proclamation of the 27th of *December 1780* directed; and also recited that proclamation, which ascertained those proportions. It then stated that in *January 1781* *G. Johnstone* was appointed commander in chief of a squadron (of which the ship of the defendant in error was one) to be employed in an expedition against the *Cape of Good Hope*, and major general *W. Meadows* was appointed commander in chief of the land

forces



forces on the same expedition; that secret instructions were at the same time given by the king to those commanders, to prevent any contest concerning the distribution of any prizes to be taken at the attack of the *Cape* by the joint operation of the army and navy, that such prizes should be divided between the land and sea forces, into two shares, to be afterwards subdivided in certain proportions. That the fleet, having on board the land forces under general *Meadows*, destined to land and attack the *Cape of Good Hope*, under the command of general *Meadows*, sailed from *England* in *March* 1781, and in the *July* following arrived within a certain distance of the *Cape*, but made no attack whatever on the *Cape*; that on the 21st of *July* the fleet, having the land forces on board, in an open and unfortified bay, called the *Saldanha Bay*, on the coast of *Africa*, at a great distance from the *Cape*, attacked and seized as prize a certain ship, called *The Hoogskarpell*, with divers goods on board, belonging to the subjects of the States General of the United Provinces. That in *June* 1782 a suit was instituted in the Admiralty Court, praying that the ship and cargo might be condemned as lawful prize to the king, as being taken by *G. Johnstone* the commander in chief of the squadron. That in *September* 1782 they were condemned as lawful prize generally, reserving the question who were the captors; and that in *May* 1785 that court pronounced for the interest of the army, agreeably to the spirit of his majesty's instructions, and decreed the prize in question to be distributed according to the directions of those instructions. That *G. Johnstone* and the officers and seamen of the squadron, conceiving themselves to be thereby aggrieved, appealed from that decree to the Commissioners for hearing and determining appeals in matters of prize, who in *June* 1786 reversed the decree, and pronounced the ship and cargo to have been taken by the conjoint operation of his majesty's ships employed on an expedition against the *Cape of Good Hope*, under the command of *G. Johnstone*, and of the army under the command of *W. Meadows* on the same expedition, and condemned the ship and cargo as lawful prize to the king. That *E. Taylor* (since deceased) and *J. Pasley* were duly appointed agents by the officers and crews of the several ships of the squadron, who soon after the decree in *September* 1782 sold the ship and cargo, and distributed part of the produce among the officers and crews of the squadron; and that the residue is now in *Pasley's* hands, and ought to be distributed by him to the captors, in payment of their several shares, in pursuance of the

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said statute and proclamation. That the defendant in error sued *Pasley* for the residue of his share in this court, in *E. 28 Geo. 3.*; and that that plea is still depending. The declaration then stated that the commissioners of appeals in matters of prize have not by the law of this realm any power or authority to take out of the hands and possession of any agent, so constituted, the money arising from the sale of any vessel, or goods, taken from the subjects of the States General of the United Provinces, which have been finally adjudged lawful prize to the king in any of his courts of admiralty, or to compel him to bring in the same; yet that the commissioners of appeals in *May 1788* admonished *Pasley* personally to bring in an account of the sales of the ship and cargo, together with the proceeds of such part thereof as might be in his hands, power, or possession; and issued process against him for that purpose.

The plaintiffs in error pleaded in the usual form, that they did not issue process against the agent &c; but, for having a writ of consultation, they demurred generally to the declaration.

The Court of Common Pleas (a), after hearing several arguments, gave judgment for the plaintiff in prohibition; to reverse which the defendants in prohibition sued out a writ of error, returnable here.

This case was argued in *Trinity* term last by *Le Blanc* Serjt. against the prohibition, and *Adair* Serjt. *contra*; and now by *Rooke* Serjt. against the prohibition, and *Lawrence* Serjt. in support of it.

The arguments against the prohibition were reducible to these three heads; 1st. That the courts of common law could take no cognizance of questions of prize, or its incidents. 2d. That at all events the mere issuing of the monition by the court of appeals was no ground for a prohibition. 3d. That that court had put a right construction on the prize-act of the *21 Geo. 3. c. 15.* 1st. It must be admitted that all questions of prize, and its incidents, are under the exclusive jurisdiction of the prize-courts. The only grounds for granting prohibitions to inferior courts, recognized at this day, are, either where those courts exceed their jurisdiction, or determine contrary to the rules of the common law, on a matter incidentally falling under their cognisance, which is also within the jurisdiction of the courts of common law. But in all other cases, the judgment, if erroneous, is the subject of appeal, but not of prohibition.

(a) *Vide L. B. Rep. C. B. 476.*



The question therefore will be, whether, after the condemnation, and the final adjudication to whom the prize belonged by the commissioners of appeals, that court immediately ceased to have cognizance of the distribution of the prize condemned by them, and whether the courts of common law were immediately invested with *exclusive* jurisdiction over the rights of the parties upon a subject where they had not even a *concurrent* jurisdiction before. The right of the common law courts to interfere in this case is put upon the act of the 21 Geo. 3. c. 15. which vests (as it is said) the legal right to the prize after condemnation in the navy; and it has been contended that by their general superintending jurisdiction they have a right to construe all acts of parliament, and confine inferior jurisdictions to such construction as they think right. But, in order to maintain that proposition in the extent now insisted on, the defendant in error must shew that since the prize acts were passed, the courts of common law acquired a jurisdiction over all questions of prize within the scope of those acts, although no mention is made in any of them of any such new jurisdiction being intended to be given. But indeed the contrary has been long settled; and it has been held by cases subsequent to some of those acts, not only that the prize courts have exclusive jurisdiction over the questions of prize or no prize, and who are the captors, but also over the distribution of the prize, which is necessarily incident to the sentence of condemnation. And in no instance can any adverse action be maintained at law for the proceeds of prize until the demand has been liquidated by the sentence of the proper court of jurisdiction. All these positions are fully elucidated in various cases; in *Lindo v. Lord Rodney* (a). *Le Caux v. Eden* (b). *Smart v. Wolfe* (c). *The King v. Broom* (d). *Frown v. Franklin* (e). *Turner v. Neele* (f). and *Thompson v. Smith* (g). It might as well be contended that, where the admiralty decide that a ship taken is no prize, they can take no further cognizance of the question, but the party aggrieved by the capture must have recourse to the courts of common law for redress: but yet it has fully settled that in such case the admiralty may proceed to give effect to their sentence by entertaining a new libel against the captors to compel them to account to the captured. And it was held in *Le Caux v. Eden* that an action for false imprison-

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(a) *Dougl.* last edit. 613. n. 1.(b) *Dougl.* 594.(c) *Ante* 3 vol. 323.(d) *Carth.* 398. and 12 *Mod.* 134.(e) *Carth.* 474(f) 1 *Lew.* 243. and 1 *Sid.* 367.(g) 1 *Sid.* 320.



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against  
HUME,  
in Error.

ment would not lie at common law where the imprisonment was merely in consequence of taking a ship as prize, though the ship had been acquitted. It should also be remembered that there is no instance of a prohibition to a court of prize; and it may be highly impolitic to make a precedent for it. 2ndly. At all events, the mere issuing of the monition is no ground for a prohibition. It is not necessary to contend, for the present, that no prohibition ought to be granted, if the party making the application had shewn any reason to the court below why the monition should not be enforced, and his plea had been improperly over-ruled: But his objection goes to the monition itself, which decides nothing, and is only the usual process of the court, issuing in the ordinary course of proceedings. It is admitted that the sentence itself is proper, and cannot now be reversed. If so, it follows that the court of appeals must have a right to enforce their own sentence, unless it appear that that court originally had no jurisdiction over the subject matter. That they had original jurisdiction appears on the face of the proceedings; and the courts of common law cannot take upon them to prohibit the execution of a legal sentence pronounced by a court of competent jurisdiction. *Smart v. Wolfe*. In answer to the monition calling on the navy agent to bring the proceeds of the prize into court, he might and ought to have appeared before the commissioners of appeals, and there have insisted on the right vested in those by whom he was appointed, and that it was not competent to that court to put a construction on the act of parliament by which that right was vested. If such a plea were admitted, the necessity for a prohibition would be done away: and till it was rejected, or at least till some other step had been taken in the court of appeals to compel restitution of the money, the party is too early in his application for this writ. Therefore the gravamen stated in the declaration, that the court of appeals have put a wrong construction on the act, is not true; for it does not appear that they have yet put any construction on it. But, 3dly, If it were competent to a court of common law to entertain jurisdiction of this question, yet the sentence and proceedings of the court of appeals ought to be enforced, in as much as this capture is not within the prize-act of the 21 Geo. 3. c. 15. It will be necessary to take a short review of the law as it stood with respect to the right of prize before the statutes, and what alteration was made by those acts. Whatever is taken by any of the king's subjects from an enemy in the course of naval operations,



rations, is prize, and appertains to the king either *jure coronæ*, or as a droit of admiralty, according to the circumstances. If taken by a private ship, without any commission from the king, the prize belongs to him as a *droit* of admiralty. If such ship had a commission, only one tenth of the prize belongs to the king as a *droit* of admiralty, and the rest is the property of the owner of the privateer. But where the capture is made by the king's ships or forces, the property is vested in the king *jure coronæ*; and in such cases it is adjudged by the admiralty *lawful prize to the king*. But that adjudication by no means imports the capture to have been made by the king's *ships* exclusively; for if it were made by his *forces* the adjudication would be the same. Now there are three sorts of joint captures; one by the king's ship and a privateer, with letters of marque, the distribution whereof is made according to the number of persons on board the several ships; the king's share being adjudged to him in *jure coronæ*. The second instance is of a capture by the king's ship and a non-commissioned privateer; there the king is entitled to the whole, the privateer's part thereof as a *droit* of admiralty, and the other in *jure coronæ*, according to the same mode of distribution. The third, is the instance in question, of a capture by the king's army and navy conjointly; and there the whole vests in him *jure coronæ*. Then the prize-acts, which were designed more particularly for the encouragement of the navy, gave the king's share to the navy, in all prizes taken solely by a naval force. But they do not extend to the case of a joint capture by the army and navy; the only joint capture provided for by the *Dutch* prize-act is that by a king's ship and privateer, where the privateer takes jointly with the king's ship: but even in such a case the whole is adjudged lawful prize to the king. That a joint capture by the army and navy is not within this act will appear as well from the title of the act (a), which is "for the encouragement of *seamen*," as from the preamble which is to the same effect, and the enacting part which is expressly confined to captures by a naval force, namely, by "flag-officers, commanders, and other officers, seamen, marines, and soldiers on board every ship," &c. Now this statute being a grant of the king's interest ought not to be extended further than the literal import of the words, especially if a more extensive construction would militate against sound policy. It is true the word *soldiers* is used both in the statute and the pro-

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clamation ; but it is coupled with the words *on board, &c.* and must be construed by the other description of persons named in conjunction with them to mean soldiers *acting as marines*, and not as a separate body of men under a distinct command. This is the construction of the prize acts, both by the navy and army, and also by the king and privy council ; because, in general, when a fleet and army have been sent out to act in concert upon the same expedition, secret instructions have been given by the king in council, by which he relinquishes his share in the prizes to both ; and when no such instructions are given, the army and navy enter into an agreement as to the several proportions which each shall take. The same has been always understood to be the law in *Westminster-Hall* in every case upon this subject, where such questions incidentally arose. And in *Le Cras v. Hughes* (a) it was held that the party had an insurable interest grounded on an expectation of the king's bounty. The question then is reduced to this, does this appear to be a capture by the conjoint operations of the army and navy, as such, or is it to be confined to a capture by the squadron *having on board the land forces*, according to the averment in the declaration ? The sentence of the commissioners of appeals must be taken to be conclusive on that point ; and they have expressly adjudged that the capture was made by the conjoint operations of the army and navy. This adjudication, it is said, is not inconsistent with the averment in the declaration ; for both may be satisfied by ingrafting the fact averred on the sentence, namely, that the army were on board the ships at the time. But the whole of the proceedings rebut such an idea, if it be meant to be inferred from thence that the army did not co-operate as a distinct body, but only according to the words of the act of parliament as *soldiers on board*. The secret instructions given by the king relate merely to the conjoint operations of the army and navy as distinct bodies ; and if the king had the power of distributing the prize conjointly at the *Cape*, notwithstanding the act, he has the same power of making the like distribution in the case of a conjoint capture at any other place. The whole dispute in the courts below has turned on this very point, whether the army were to be considered as acting at the time as a distinct force, or merely in the character of *soldiers on board* ; sentence having been ultimately given for their right, it is clear that that must be intended of the right claimed by them, namely, of a share of the prize due

(a) *E. 22 Geo. 3. Park. Insur. 307.*

to



to them in a distinct capacity from the navy. The sentence itself speaks of them as under a distinct command from the fleet, which could not be, if they were merely acting in the nature of marines on board. That averment then in the declaration of their being *on board* at the time of the capture, within the meaning of the act, is altogether repugnant to the sentence of the Court of Appeals, and is therefore utterly void, and a good ground of demurrer. But even if it were admitted that by the prize act *something* were vested in the navy, still as the *whole* was not vested in them, the monition was properly issued to compel the agent to bring the proceeds in his possession into Court, that the remainder of the profits might be distributed to those who are entitled.

The counsel for the prohibition submitted two propositions to the Court. 1st, That prohibitions have at all times been granted where inferior courts have put a different construction upon an act of parliament from that which the courts of common law would have put, although such act were passed relative to a subject matter of which such inferior courts had original jurisdiction. *Harrison v. Burwell* (a). *Wheeler's case* (b). *Slawney's case* (c). 2 *Roll. Abr.* 303. *pl.* 27, 28. 306. *pl.* 10. *Sir W. Juxon v. Lord Byron* (d). *Carter v. Crawley* (e). *Berkley v. Morrice* (f), and *Pierce v. Hopper* (g). If it be urged, in answer to this last case, that the prohibition went because the defendant below was not within the jurisdiction of the admiralty, the same answer will apply to every case where prohibitions have been granted to inferior courts, because they have put a wrong construction on an act of parliament, in order to extend their jurisdiction, as it is contended that they have done here. The principle of all these authorities was again recognized by Lord Mansfield in *Howe v. Nappier* (h), where he said that a prohibition is *ex debito justitiæ*, if the court of Admiralty proceed contrary to act of parliament. Upon the like principle have prohibitions been granted where the inferior courts have determined contrary to the rules of the common law. 1 *Roll. Rep.* 12. 2 *Roll. Abr.* 301. *pl.* 11. 307. *pl.* 13. *Bastard v. Stukley* (i), and *Shotter v. Friend* (k). If it

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(a) *Vaugb.* 206.(b) *Godb.* 218.(c) *Hob.* 83.(d) 2 *Lev.* 64.(e) *Sir T. Ray.* 497.(f) *Hard.* 502.(g) 1 *Str.* 249.(h) 4 *Burr.* 1950.(i) 2 *Lev.* 209.(k) *Cartb.* 142.



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were any answer to this prohibition to say that, the subject matter being within the jurisdiction of the prize court, the error in their judgment, if any, can only be rectified on appeal, the same answer might have been given in most of the instances cited, and yet it never occurred. The authorities which have been cited on the other side do not contradict the position now contended for, that this Court have a right to examine whether the construction put upon the stat. 21 Geo. 3. c. 15. by the Court below be right or not. For it is not necessary to deny that, where the inferior courts have cognisance of the principal question, they have not also cognisance of all incidental matters necessarily arising therefrom: but all that is contended for is, that if in deciding such incidental matters they determine differently from the common law courts, that is a ground of prohibition. Neither, is it disputed that they have authority to enforce that which they may decide, or that the mere issuing of a monition is of itself a ground of prohibition, unless it appear (as in the present case) that the command included therein is directly repugnant to the true construction of an act of parliament. With respect to what is said of there being no instance of a prohibition to a prize court, that could have no weight, even if the fact were so; but in fact there is an instance in 2 Leon. 182. And in *Lindo v. Rodney* a prohibition was denied, not because it would not go in any case to a prize court, but because that was not a proper case for it. 2dly. The court of appeals have mis-contrued the statute, and done an act not warranted by it. It is not the sentence itself which is complained of, because the terms of it are such as exactly accord with the true construction of the act of parliament, and by which the property in the prize is expressly vested in the navy: but the mistake lies in the conclusion which the Court below have drawn from such sentence; and which supposes the property to be vested in the crown instead of the navy; and this they have attempted to enforce by issuing the monition in question. After the prize court had adjudged the property to be lawful prize to the king, and that the claimants were the captors, the act vested the property absolutely in them: whereas the effect of the monition is to vest the property in the king, as contradistinguished from the captors. It is immaterial in what right the crown was originally entitled to prize, because in whatever way it was acquired, the crown has parted with it all in favor of the captors, by virtue of the act of the 21 Geo. 3. c. 15. and



and the proclamation. All then that remains to be shewn is, that the persons adjudged to be the captors fall within the description of the act. The sentence of the court of appeals declares the prize ship to have been taken "by the *conjoint operation* of his majesty's ships and vessels, employed on an expedition against "the *Cape of Good Hope*, under the command of the said *George Johnstone*, and of the army under the command of the said "W. *Meadows* on the same expedition." The words of the statute are, "that the flag officers, commanders, and other officers, "seamen, marines, and foldiers, on board every ship and vessel "of war in his majesty's pay, should have the sole interest and "property of and in all and every ship, vessel, goods, and merchandizes, which they had taken &c." So long therefore as the troops remained on board before their arrival at the *Cape*, they fell exactly within the description of the act, as *soldiers on board*. And that such was the case here is evident upon the face of the whole proceedings, independently of the express averment of that fact in the declaration. For the capture was made at sea before they came to the *Cape*; and it is not to be collected, nor can it be intended, that the troops were landed at the time. The secret instructions merely relate to the case of an attack upon the *Cape*; where the operations of the two bodies would be adapted, each in it's own sphere, to the particular emergency. Till their arrival there the troops were merely passengers on board, and only entitled to share accordingly; and the circumstance of there being no provision made for any other joint capture shews the sense of the king and council that in the case of any previous capture, while the troops were on board, the property would vest under the prize act and the general proclamation. The case of *Wemys v. Linzee* (a) is strong in point. There the plaintiff a captain of marines, and his troops, on board a man of war when a prize was taken, not belonging to the ship's complement, were only entitled to share as passengers. The same rule was laid down in the case of captain *Huston*, who, with his troops under his command, destined for the reduction of *Louisbourg*, was on board a man of war at the time of the capture of the ship *La Charmante* at *Louisbourg* in 1745. Those cases are exactly analogous to the situation of the army under the command of general *Meadows* in the present instance, who are expressly averred in the declaration to have been *on board* at the time of the capture. But it is said

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(a) Dougl. new edit. 324.

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that such averment, being contrary to the sentence, is bad on demurrer, which only admits that to be true which is well pleaded. That argument might have some weight if the averment were necessarily contradictory to the sentence: but that is not so; for *non constat* by the sentence that the army were not on board; and the nature of the transaction shews plainly that they must have been there. Nor is that idea at all contradicted by the adjudication that the army were under the command of general *Meadows* at the time; for that would be the case though they were still on board. Such of them as had been guilty of a breach of military duty would still have been amenable to a court-martial of army officers. Now if the sentence can by any reasonable construction be made consistent with the averment, the Court are bound to admit of such construction; more especially when a contrary one would make the sentence directly repugnant to the statute in effect, although verbally accordant with it. Besides, if the other side had disputed the fact of the land forces being on board, they ought to have taken issue on it. On the whole this was a sole capture by the navy within the meaning of the act of parliament, though made while the troops were on board; and therefore so far it may be said to be made conjointly with them, as to entitle them to share in the same manner as the troops did in the cases of *Wemys v. Linzee* and captain *Huston*. If this be the true construction of the act, and the sentence of the court of appeals fall exactly within it, it is plain that that Court can have no ground for issuing this monition directly in opposition to the act, which has declared that the prize should be placed in the hands of an agent appointed by the navy for their benefit; and the Court below have no authority to dispossess the agent so appointed, without a complaint at least from the persons by whom he was appointed. Nor can the act be carried into execution by any other than such an agent, who is thereby specially entrusted with the performance of certain duties, such as providing for *Greenwich Hospital*, &c. The issuing of such a monition is also greatly detrimental to the interests of the parties concerned, who might maintain an action at common law against their own agent for liquidated shares of prize, but not against the officer of the court, who is bound to obey it's orders. Neither is any other than the person appointed to be agent under the act bound by the penalties thereof. If any other than the parliamentary agent appointed by the captors had got the proceeds into his hands, the Court

I

below



below might have issued such a monition; because that would not have been contrary to the statute law of the realm.

*In reply* it was said that the case in *Leonard* was merely the case of a common law agreement made on land, over which the common law courts had jurisdiction; but this is a question touching the right of prize, which is under the exclusive jurisdiction of the prize-courts. Now if the sentence must be taken to be conclusive, and there be no objection to it, it follows that the prize-court must have a right to execute it; and they best know the meaning of their own sentence. The whole of the defendant's argument proceeds on the idea that this was a capture by the navy only, which is directly contrary to the fact adjudged in the sentence. The cases where prohibitions have gone to inferior courts for misconstruing acts of parliament have been where such acts tended to narrow their jurisdiction, and the constructions put upon them were for the purpose of enlarging it. Those prohibitions, if they can be supported at all, went on the ground of a defect of jurisdiction in the courts below: but here no such defect has been shewn; for the prize-courts have still exclusive jurisdiction over the question of prize and all its incidents. And the prize-acts are rather to assist, than narrow, the jurisdiction of the prize-courts. It is said that actions at common law have been maintained against agents for the amount of prize; and the case of *Wemyss v. Linzee* is cited as an instance: but it must be remembered that that case was by consent; and Lord *Mansfield* said that without such consent there would have been great difficulty in trying it. And certainly no such action can be maintained before the sum is liquidated, which may be because the courts of common law would not suffer an agent to set up any other authority against his masters, from whom he received the money. With respect to the several duties imposed by the act on the agent, they may equally be fulfilled by another agent appointed by the Court; and this Court will not presume that such agent will neglect or betray his duty.

Lord KENYON, Ch. J. With many of the topics discussed in the court of Common Pleas, and which were relied on in the judgment of that Court, I fully concur; but I do not think that they lead to the conclusion which was drawn from them, namely, that a prohibition ought to go in this case. The determination of this case does not necessarily involve in it those questions which were so much pressed, in what cases in general

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a prohibition should be granted to inferior courts when they are acting in opposition to an act of parliament, or when they proceed in a different manner from the temporal courts. For the question here turns on the propriety of the court of appeals granting the monition, supposing that all the prior proceedings in the court below were right. And in considering that point we may take for granted, what indeed has been and must be admitted in the argument, that the prize-courts are the sole judges of the question of prize, as also of the question who are the captors. The latter question has very frequently occurred in those Courts in cases where it has been doubtful whether ships not actually in sight, or even within the hearing of the guns, should be considered as present at a capture so as to entitle the commanders to share in the prize; in determining which those courts have always been influenced by this consideration, whether such ships were rendering any assistance, or even ready to do so, to those by which the capture was made. I merely mention this to shew that those courts have the sole and exclusive jurisdiction over the question, who are the captors.

By the 21 Geo. 3. c. 15. which was passed on the breaking out of hostilities with *Holland*, it was enacted that the flag-officers, &c, should have the sole interest and property of and in all and every ship, vessel, goods, and merchandizes, taken by them during the hostilities, after the same should have been finally adjudged lawful prize to his majesty, in any of his majesty's courts of admiralty, to be divided in such proportions as his majesty should by proclamation direct. Then in order to ascertain whether the ship taken in *Saldanha Bay* were or were not lawful prize, and who were the captors, proceedings were instituted in the admiralty court, where a decision was made, which not being satisfactory to the parties, an appeal was lodged against it to the lords commissioners of appeals; and that court decreed that the ship "was taken by the conjoint operation of his majesty's ships and vessels, employed on an expedition against the *Cape of Good Hope*, under the command of *G. Johnstone*, and of the army under the command of *W. Meadows*, on the same expedition; and they condemned the ship, together with the unclaimed part of the cargo, as lawful prize to the king." Now it is admitted that that sentence can by no means be revoked; for the litigating parties have gone to the utmost extent of the law, and those, who by the constitution of the country are to decide



decide as the dernier resort in cases of this kind, have decided on the question of prize, and also who were the captors of that prize. If that be so, the manner in which this prize is to be divided among those, who are thus declared to be the captors, must be determined by that court. The sentence itself is not objected to; the prohibition does not impute to the court of appeals the having transgressed the limits of their duty in forming it. It stands therefore *ex concessis* that that sentence is that from which all the rights of the parties are to result; and the single objection is that that court, having so decided, have granted a monition to the person in possession of the proceeds of the prize to bring them into court to answer the several claims that may be made. And the objection is that this monition is wrong, because the proceeds of the prize are in the hands of the agent appointed by the officers of the fleet: If those officers were the only persons entitled to the prize, the objection would have had considerable force. But it appears from the sentence of the court of appeals that, in the opinion of those who made that decree, other persons were interested, besides those by whom the agent was appointed; and that there were some rights in the king, not disposed of by the act of parliament. If so, why should not this property be taken out of the possession of the agent, and put under the control of those who will take care of the interest of all the parties concerned. And I cannot bring myself to doubt but that the monition to bring the proceeds into court was properly issued. For these reasons, I am of opinion, that the judgment of the court of common pleas ought to be reversed.

ASHHURST, J. Though this is a case of great importance, I do not think it a question of much difficulty as to the principal point. It is admitted that the courts of admiralty have exclusive jurisdiction over all questions of prize; and if so, they must have the same jurisdiction over all matters that arise incidentally either in construing acts of parliament or proclamations, in order to form their opinion on the principal question. It has been objected in this case that they have transgressed the limits of their duty in putting a wrong construction on the prize-act: but they have not put any construction on that act further than saying that this case, under all its circumstances, does not come within it. And I concur with them in that opinion. The prize-act was only meant to attach on captures by ships; and the legislature accordingly adapted all the provisions

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fions of it to captures of that description, without extending them to a joint capture both by the army and navy. Therefore it seems to me that this is *casus omiffus*, and does not fall within the purview of the prize-act. Now whether this were a capture by the navy only, or a joint capture by the army and navy, was a question of fact, of which the courts below were the proper judges. And here the court of appeals pronounced this to be a joint capture by the navy and army, *quâ* army. And indeed if it were otherwise, the general and other superior officers of the army could only share as common sailors, which cannot be taken by implication to have been the intent of the Legislature in such a case as the present. Besides by the prize-act the king has a right to distribute the prizes taken in such proportions as he shall declare by his proclamation: And he declared in his secret instructions which were issued when this expedition was planned, and which I think have the effect of a proclamation, that in the case of a joint capture by the army and navy that the prizes taken by them should be distributed in a different manner from that insisted on by the navy.

Then, admitting the sentence of the court of appeals to be conclusive, the only remaining question is whether they have erred in issuing the monition to compel the agent to bring the proceeds into court. Now it seems to me that, so far from their having exceeded their jurisdiction in taking this step, it was a necessary consequence of their sentence; for, if it were a joint capture, the army were equally entitled to appoint an agent. As the navy are not intitled to the whole, it cannot be contended that their agent ought to be entrusted with all the proceeds of the prize. But the prize court are trustees both for the army and navy; and it is fit for the interest of all parties that the proceeds should be brought into that court till the several claims are adjusted. It has been argued, and very properly too, that the allegation in the declaration in prohibition, that this was a capture by the navy only, is not to be admitted, because it is a direct negative of the sentence, which I am of opinion is conclusive; and therefore the parties have done right in demurring to the declaration.

BULLER, J. If it were competent to us to decide on the second question, whether or not the court of appeals had misconstrued the act of parliament, I should desire further time, in order to look into the authorities, particularly those of *Lindo v. Rodney*, and *Wemyss v. Linzee*, before I delivered my opinion upon



upon it, not being, as at present advised, inclined to differ from that given in the court of common pleas. But I think that it is not now competent to this court to examine that question. It is to be remembered that the question now before us is, whether we shall prohibit the court of appeals from proceeding in a prize cause. And in such questions the only point for our consideration is whether the court, to which the prohibition is prayed, has a jurisdiction over the subject. Whatever may have passed in the several cases on this subject in the last century, the grounds for granting and refusing prohibitions are now clearly and accurately defined. If the court below have jurisdiction over the subject, though they mistake in their judgment, it is no ground for a prohibition, but is only matter of appeal. Another rule equally clear is that, after sentence, the courts of common law never grant a prohibition to inferior courts, unless the want of their jurisdiction appear on the face of the libel. *Hutchins v. Full, Cowp.* 422. The cases cited by the counsel for the defendants in error will not assist them at this time: indeed most of them were cited, not on account of what the courts decided, but for what they said they would do in particular cases; and in all of them, except one, the prohibition was refused. One of them was 2 *Ro. Abr.* 306. *pl.* 10. where it is said, that "if a parson lease to a parishioner the tithes of his estate, and then sue him for the tithes in kind, no prohibition will be granted, although the parson suppose that the condition, upon which he leased, was broken; for the Court below shall try this question, having cognizance of the principal: but if they adjudge otherwise than is warranted by the common law, then a prohibition will be granted." That *dictum* certainly cannot now be supported. Another passage, nearly to the same effect, cited from the next page (a), is equally objectionable. But it appears from some of the cases cited, that the court even at that time of day were guided by this consideration, whether the court below had jurisdiction or not; and that seems to be the sum of the case of *Harrison v. Dr. Burwell* (b). And in *Hill v. Good* (c) Lord Ch. J. *Vaughan* states that to be the landmark in such cases. In that case a clause in the stat. 32 *Hen.* 8. c. 38. was relied on, that no person should marry within the *Levitical* degrees: then in cases without the *Levitical* degrees, the legislature expressly ousted the ecclesiastical court. In giving

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(a) 2 *Ro. Abr.* 307. *pl.* 13.(c) *Vaugh.* 302.(b) *Vaugh.* 206.



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the judgment there Lord Ch. J. *Vaughan* put a case (a) applicable to the present; "If by act of parliament anciently all marriages, not prohibited by God's law, or canons of the church, had been declared lawful, the temporal courts had thereby no power to prohibit the questioning of any marriage more than before, for it had said no more than what the law was, and did say, before such act. For though such act of parliament had been, yet it had given no new jurisdiction or cognisance in matrimonial matters to the temporal courts, but had been only directory to the courts which had the cognisance; and if any judgment had been given amiss in them, it was to be rectified by appeal, according to those statutes, or by commissions of delegacy." So I reason on this act of parliament: The prize-act is directory only; the effect of it is to direct how the prize courts shall distribute the prize when they have adjudged the thing taken to be prize, and was not intended to give a new jurisdiction to the common law courts. The case of *Wheeler* (b), cited at the bar, seems to have been decided on the ground that the ecclesiastical court had no jurisdiction in that case. It is there stated that the Court said, "that the feast day of *St. John the Baptist* was a holyday by act of parliament, and that it belonged to the judges of the law to decide whether the same were broken by doing of such work upon that day, or not." Now the court must have reasoned thus; the act of parliament (c) gave jurisdiction to the ecclesiastical courts to punish persons who were guilty of any offence committed against it, provided it were not done in harvest time, or at other times of the year when necessity should require; but in those two excepted cases the ecclesiastical courts have no jurisdiction; that was out of the excepted cases, and therefore the court of common pleas granted a prohibition. But if that case be understood as establishing this point, that the ecclesiastical courts had no jurisdiction to construe the act of parliament, it cannot be supported; for one of the sections (d) of the act expressly gives them jurisdiction. Indeed it does not appear from the state of the case in *Godbolt* that the court adverted to the statute. And the ground of that case must have been that it appeared on the face of the libel that the ecclesiastical court had no jurisdiction in that particular case. Another case was cited from 2 Ro. Abr. 303. pl. 27. in support of this prohibition, which cannot be supported; for it is there stated that a prohibition was granted to the court, for the purpose of trying the law,

(a) *Vaugh.* 304.(b) *Godb.* 218.

(c) 5 Ed. 6. c. 3.

(d) Sect. 3.



to whom administration should be granted, only because that court *intended* to revoke the administration to a brother of the half blood in preference of one of the whole blood: No prohibition can be granted for the purpose of trying the law, nor in cases only where the courts below intend to do an act. And if they have jurisdiction, it is immaterial whether they give a wrong sentence, or only intend so to do, since in neither case will a prohibition be granted. It is much to the satisfaction of the judges of the present times that the principles, on which prohibitions are granted, are clearly settled. For on reading some of the cases that were determined in the last century, we cannot but see that they happened at a time when it was the fashion of the Courts of *Westminster-Hall* to run down the ecclesiastical courts; and *Ld. Ch. J. Vaughan* himself said, "It does seem as if this court had in some of the cases bordered on things that were spiritual", which should not have been done. And in one of the old cases, though it was admitted that the ecclesiastical court had jurisdiction, a prohibition to the court of delegates was granted merely to support the original sentence below. Now if the ecclesiastical court had no jurisdiction, that sentence ought not to have been permitted to stand; and if they had, it is impossible to contend that the court of delegates had not the same jurisdiction. The only case on this point within the last century is that of *Pierce v. Hopper* (a): but that does not assist the present case; for there it was only held that the jurisdiction of the inferior courts may be confined as well to the *persons* as to the *subject matter* of the suit.

Then it was said in this case that, though the parties who sued this prohibition do not complain of the sentence below, a prohibition ought to be granted, because the monition was improperly issued. For the reasons I have already given, I am clearly of opinion that we cannot examine whether that sentence be right or wrong. And the court of Common Pleas admitted that, if the sentence below vested a right in the king, the monition was consistent with it. For towards the close of the judgment in the Common Pleas, *Lord Loughborough* said "The construction which has been put upon the second sentence is that there was no vested right in this prize in the officers and crews of his majesty's ships, nor in the army; but that, upon the ground stated in the sentence, the whole was vested in his majesty by his pre-

(a) 1 Str. 249.

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rogative, and was to be disposed of to such uses as his majesty should think fit." This they take as the ground of the sentence of the court of appeals; and then they add "with that construction of the sentence the monition which has issued is perfectly consistent". And indeed it would be strange if the court of appeals could give a judgment, which they could not enforce. The ground therefore on which the court of Common Pleas proceeded was this, they thought that the court of appeals had misconstrued the act of parliament, on which they granted a prohibition. But I am of opinion that a court of common law cannot now examine that question, and therefore that the judgment given in the Common Pleas should be reversed.

GROSE, J. This prohibition was granted on an idea that the monition was issued contrary to a legal right vested in the parties under the stat. 21 Geo. 3. c. 15. Now whatever determination we should make on the construction of that statute, if the question were open to us, it appears clearly to have been the intention of the Legislature, that the courts of Admiralty should be the sole judges of the questions of prize or no prize. Even if they had not had that exclusive jurisdiction before, I think the Legislature intended that they should have it under this act of parliament. And therefore it is not competent to us now to look into the sentence of the court of appeals but for the purpose of understanding the meaning of that sentence. Now if this be such a decree as will authorise the Court below to issue the monition, there is no ground for a prohibition: but if it be such as will not warrant that Court in issuing it, then a prohibition ought to be granted. And that brings the whole to this question, what is that sentence? The plaintiff in prohibition contends that under this sentence the navy are entitled to the whole proceeds of the prize, on the ground that all the interest in the prize was vested in them by the act of parliament. But consider the proceedings in this case; the prize act gives to the navy the interest in the prizes taken by them during the hostilities with *Holland*, to be divided in such proportions as the king by his proclamation should direct. But the king and council thought that there might be a capture by the king's ships, which would not come within this clause in the act; for they gave to the officers who were sent out on this expedition secret instructions to provide for the case of such a capture. The navy first instituted a suit in the Admiralty Court, claiming the sole interest in the prize under this act of parliament and the proclamation.



clamation; that Court decreed the ship to be lawful prize, but reserved the question who were the captors, on this ground that it might turn out that the army were entitled under the secret instructions; and afterwards it was decreed in favor of the army: to this an appeal was lodged in the court of appeals, where the sole question was whether the capture were within the meaning of the prize act, or within the case alluded to in the secret instructions of the king and council; and that Court determined that it was a joint capture by the navy and army, and adjudged it good and lawful prize to the king. This sentence therefore is clearly in opposition to the right claimed by the navy; and the clear meaning of it is this, that the persons claiming under the prize act had no right, that it was not a case provided for by the act, but that it fell within the secret instructions. Then the monition was properly issued. I am clearly of opinion that whether the court of appeals were right or wrong in their decree, it is not competent to us to form any judgment upon the subject; because the Legislature has placed full confidence in them: and it follows from hence that those persons, who pronounced the sentence, are the best judges as to the mode in which it shall be carried into execution. I am therefore very well satisfied that no prohibition ought to be granted in this case, because the court of appeals was not guilty of any excess of jurisdiction in issuing the monition, since all the persons interested in the prize ought to have concurred in appointing the agents. To this it was answered in another Court that it is stated that they were *duly appointed*: but that only means *duly appointed by the navy*. However without giving any opinion upon that point, I am of opinion that it is not competent to us to examine the judgment of the court of appeals for any other purpose than that of construing it: that sentence appears to be a decided negative of the right insisted on under the prize act by the plaintiff in prohibition; and therefore the judgment given in the Common Pleas in favor of that right ought to be reversed.

Judgment reversed.

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Friday,  
Nov. 11th.HOSKINS *against* LORD BERKELEY.

On a feigned  
issue costs  
follow the  
verdict.

But, *quære*,  
when the  
Court per-  
mit parties to  
try a feigned  
issue, whether  
they will not  
compel them  
to consent  
that the costs  
shall be in  
the discretion  
of the Court.  
Trying a  
feigned issue  
without the  
consent of the  
Court is a  
contempt of  
the Court;  
and after such  
a trial they  
will stay the  
proceedings.

THESE were two issues, to try, first, whether there were any such manor as the manor of *Hinchcombe* in the county of *Gloucester*; the second whether the parish of *Hinchcombe* were situate within, and parcel of, a manor belonging to the plaintiff, which now is, or at any time hath been, the manor of *Hinchcombe*; the affirmative of both which lay on the plaintiff.

On the trial the plaintiff succeeded on the first, and the defendant on the second, issue: and the defendant having obtained a rule to shew cause why the master should not be at liberty to tax him his costs upon the second issue; cause was now shewn by

*Wood* and *Walton*, who relied on *Herbert v. Williamson*(a); where it was held that on the trial of a feigned issue costs must follow the verdict, and that the Court had no discretion upon the subject.

*Bower* and *Lane* argued in support of the rule.

The Court at first thought themselves bound by the authority of the case of *Herbert v. Williamson*; but strongly intimated an opinion that, as feigned issues were only granted with the leave of the Court, it would be prudent in future when they permitted such issues to be tried to compel the parties to consent that the costs should be in the discretion of the Court. But it afterwards appearing in this case that these issues had been tried without the consent of the Court, they ordered all the proceedings to be stayed; adding that such a proceeding was a contempt of the Court.

(a) 1 *Wils.* 324. See also *R. v. Phillips*, 1 *Wils.* 261.

Tuesday,  
Nov. 15th.RORKE *against* DAYRELL.

If goods be  
taken in exe-  
cution on a  
*fi. fa.* against  
the king's  
debtor, and  
before they  
are sold an  
extent come

at the king's suit, grounded on a bond debt, teste'd after the delivery of the *fi. fa.* to the sheriff, these goods cannot be taken upon the extent.

THIS was an action upon the case brought by the plaintiff against the defendant as sheriff of the county of *Bucks* for a false return of *nulla bona* to a writ of *fieri facias*. On the trial the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case;



In *Hilary* Term 1787 the plaintiff obtained judgment against *Michael Clarke* for 727*l.* and 63*s.* costs; on which judgment the plaintiff on the 5th *January* 1788 sued out a writ of *feri facias*, teste'd 28th *November* 1787, and returnable the 12th *February* 1788, directed to the defendant, being then sheriff of the said county. The plaintiff delivered the writ to the under-sheriff on the 7th *January* 1788, which was indorsed to levy &c; on the next day, the 8th *January*, the sheriff seized all the goods and chattels of *Clarke* in his bailiwick by virtue of that writ; but before any of them were sold, namely, on the 11th of *January* 1788, a writ of extent teste'd that day issued out of the court of Exchequer, directed to the defendant as sheriff, on a bond to the crown under the seal of *Clarke*, dated the 5th of *April* 1782, for the sum of 300*l.* payable at a day before the issuing of the said writ of *feri facias*, and which then remained unpaid. On the 12th *January* 1788 notice was given to the defendant's officers, who were in possession of *Clarke's* goods under the *feri facias*, of the issuing of the writ of extent, and on the next day the same writ of extent was delivered to the under-sheriff. The case then stated that another writ of extent issued on the 17th of *January* 1788, on another bond of *Clarke* &c, which was delivered to the sheriff on the 18th of *January*. On the 22d of *January* 1788, by two several inquisitions taken under and by virtue of those two several writs of extent, it was found that *Clarke* then had the several goods and chattels so as aforesaid taken under the *feri facias*, and remaining in the defendant's hands unfold; and the defendant therefore then extended, took, and seized, the said goods and chattels into the hands of the king by virtue of the said two several writs of extent. The case also stated three other writs of extent against *Clarke*, two of them teste'd the 23d of *January*, and the other on the 1st of *February* 1788. The case further stated that on the 1st of *February* 1788 a writ of *venditioni exponas*, teste'd that day, issued out of the court of Exchequer, directed to the defendant as sheriff, for 300*l.* upon the first writ of extent; and also four other writs of *venditioni exponas*, on the 1st, 4th, 11th, and 21st, *February* 1788; By virtue of which several writs of *venditioni exponas* the defendant, as sheriff, on the 23d of *February* 1788 sold all the goods and chattels of *Clarke*, which he had seized or could seize for 983*l.* 9*s.* 2*d.*, which sum was insufficient to satisfy the several writs of extent and *venditioni exponas*,  
and

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and the sum of 219*l.* 13*s.* which was due to the landlords of the premises on which the goods and chattels were seized for one year's rent. On the 12th of *July* 1789 the defendant made the return of *nulla bona* to the plaintiff's writ of *fiери facias*.

This case was twice argued, the first time on *Friday July* 8th by *Chambre* for the plaintiff, and *Russell* for the defendant; the second time on this day by *Bower* for the plaintiff, and *Erskine* for the defendant.

Arguments for the plaintiff. This case depends on 33 *H. 8. c. 39. §. 74.* which enacts, "That if any suit be commenced or taken, or any process be hereafter awarded, for the king, for the recovery of any of the king's debts, then the same suit and process shall be preferred before the suit of any person or persons; and that our said sovereign lord, his heirs and successors, shall have first execution against any defendant, of and for his said debts before any other person, *so always that the king's said suit be taken and commenced, or process awarded, for the said debt at the suit of the king before judgment given for the said other person.*" At common law till the execution of the subject was complete, the crown was entitled to a preference; but inasmuch as the king could only take by matter of record, and in the case of bonds it was necessary that the debt should be found by inquisition before an extent could issue, therefore that act was passed to put bonds made to the king [*Seet. 50.*] upon the same footing as a statute staple; and to give the like process, judgment, and execution [*Seet. 53.*] But this extension of the prerogative in the case of obligations acknowledged to the king was made with this exception in favor of the subject, that the king's suit or process should not be preferred, unless it were commenced or awarded before the subject had obtained judgment. But a distinction is supposed to exist between executions against *land* and against *goods*; and it will be contended that the prior execution given to the king does not extend to the *latter*. But the words themselves of the passage in question warrant no such distinction; they are general. The title of the act appears to have no reference whatever to this subject. There are however several provisions in it which in their nature must extend to executions against personalty; such as the 77th section, which enables the crown to charge *executors* and *administrators* out of the assets in their hands. Neither is there any reason why "execution" in this act should be confined to *lands*: for if



it were, it would narrow the king's right in a case where he had a prerogative before that statute. For before, and now, notwithstanding this act, if the king have a debt due to him on record, the debtor's lands are bound from that time, and he may take out execution for his debt, even though an *elegit* may have been issued at the suit of a subject. *Gilb. Hist. Exch.* 88. No such distinction has ever been taken in any of the cases on this subject; but on the contrary there are several authorities in support of the plaintiff's title in this case; and which would have received different determinations if this clause in the statute were confined to lands. In *The Attorney General against Andrews* (a) the question arose on the statute of *Hen. 8.* whether the execution executed of the subject upon a judgment obtained before any suit or process commenced by the king should be preferred to the extent of the king, issuing on a bond debt, bearing date before the defendant's judgment, and assigned to the king before the defendant's execution. There the execution at the suit of the subject was by *elegit*, under which it is well known a term of years may be extended. The Court were clearly of opinion, that the statute of *Hen. 8.* abridged the king's prerogative in extents upon bond debts; and that in that case the extent of the crown came too late; Baron *Nicholas* said "that the statute enacts a new thing, and *ita quod* makes a condition precedent, and a limitation": and the Chief Baron relied upon this "that the subject's title was prior to the king's, and was executed". In *Lechmere against Thoroughgood* (b), it was held after much consideration that after execution at the suit of the subject begun, but not completed, the king's extent came too late. And lastly, in *Uppom v. Sumner* (c), where all the authorities were examined, it was finally determined that if the king's extent be sued out posterior to a judgment recovered by the subject, and writ of execution thereon delivered to the sheriff, though not executed, the king shall not be preferred. That is the very case at bar. And Lord Chief Baron *Comyns* (d) was of the same opinion, who says "If execution be upon a judgment against the king's debtor, and before a *venditioni exponas* an extent come at the king's suit, those goods can be taken upon the extent." Therefore the words of the statute being general, and nothing in it to confine the con-

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(a) *Hard.* 23.(b) 3 *Med.* 236. and *Comb.* 123.(c) 2 *Black.* 1251, 1294.(d) 2 *Dig.* 538.



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struction of it to *lands*, and the reason of the thing, and other provisions of the statute operating the other way, and the point having been before expressly decided, there is no ground for postponing the plaintiff's execution.

Arguments for the defendant.—It is not denied that the statute 33 H. 8. c. 39. was passed in order to extend the prerogative of the crown; but the construction contended for by the plaintiff tends to narrow, instead of enlarging, it. And if the case of *Uppom* and *Sumner* be law, the crown, so far from being in a better, will be in a worse, situation than the subject. This may be exemplified thus; it is clear that the king is not bound by the statute of frauds (a), [2 Bac. Abr. 365. (K); and *Gilb. Hist. Exch.* 90;] by which it is enacted that no execution shall bind the property of the goods but from the time of the delivery of the writ to the sheriff; and therefore, with respect to the king, the common law still operates to bind the goods from the teste of the writ. *Gilb. Exch.* 90. Now if *A.* recover judgment against the king's debtor on 1st January, but do not deliver his writ of execution to the sheriff till the 4th, and *B.* also recover judgment against the same person on the 3d, and deliver his writ on the same day, and on the 2d an extent issue at the suit of the crown; according to the construction contended for, this absurdity would follow; that the king would not be preferred as against *A.*, though he would as against *B.*; and yet it must be admitted that *B.* is entitled to a preference against *A.* According to the plaintiff's construction of the statute of Hen. 8. the judgment is made to operate upon *personal* as well as *real* estate, which has never been contended for. The very mention of the judgment in the statute of Hen. 8., as the criterion by which the property was to be bound, as against the king, shews that the Legislature intended to speak of *land* only, with respect to which the king's right of execution was to be barred if the subject had first recovered judgment. The word "judgment" was insensible with respect to execution against personal property, but was operative as against *land*. And it is plain from the whole of the passage in 2 Bac. Abr. 365, that Lord Ch. B. *Gilbert* was of that opinion. The case of *Uppom v. Sumner* has indeed decided the contrary: but this case was reserved for the very purpose of reconsidering the authority of that. That case proceeded upon erroneous principles; it is not warranted by the authorities cited in support of

(a) 29 Car. 2. c. 3.



it; and it is contrary to many others upon the point. The Court there were mistaken in supposing that the statute was introductive of any new restriction upon the ancient prerogative of the crown; for it was clearly passed to enlarge the bounds of the prerogative by giving the king a speedier remedy with respect to bond debts than he had before. The principal authority there relied on was that of *Hardr.* 25. but that was the case of an *elegit*; and it is admitted by this construction of the statute that the king cannot have the priority as to lands if the subject has obtained judgment first. The case of *Lechmere v. Thoroughgood* (a) went on the ground that the officers should not be made trespassers by relation; and that, and the case of *Rex v. Dickenson* (b), were cases of extents in aid, which differ widely from original extents, the prerogative not being so strong in the former as in the latter case *Gilb. Hist. Exchq.* 167, 169. With respect to what is said in the report by *Comb.* 123, Lord Mansfield, in *Cooper v. Chitty* (c) says that the reporter must have been mistaken, for Lord Holt could never say "that the property of the goods is vested by the delivery of the *fi. fa.* and the extent of the king afterwards comes too late"; for no inception of an execution can bar the crown. This matter was lately very fully discussed in the court of exchequer in the case of the *King v. Cotton* (d). That case of the *King v. Cotton* is very strong against the decision in *Uppom v. Sumner*; for Lord Chief Baron Parker in giving judgment relies on several cases which are directly contrary to it. And though *Rex v. Cotton* was the case of a distress, yet the Court considered it on the same principles as if it had been an execution. They said that an intent to sell was no sale; and that goods are always liable to be taken under an extent, if there has been no sale by the sheriff; and they seemed to take it for granted that the criterion was the sale by the sheriff which altered the property in the goods. The same was expressly held by *Dodderidge* Justice, in the case of *Sir Edward Cook* (e), who says that "if the subject obtain judgment and sue out execution, yet if a writ come for the king before the execution is complete, the king shall be preferred". And *Hobart*, Ch. J. in the same case (page 299) said "The king shall never lose his debt, but where there is nothing to satisfy it". In *Petit v. Benson* (f) it is said that if a sheriff execute a writ of *fi. fa.* he may afterwards

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(a) 3 *Mod.* 236. and *Comb.* 123.(b) *Parker* 262.(c) 1 *Burr.* 36.(d) *Park.* 112.(e) 2 *Roll. Rep.* 295.(f) *Comb.* 452.



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return *nulla bona* upon appearance of a writ of prerogative subsequent. So in 2 *Show.* 481. it is said " extents have been held good that have been made upon goods actually levied by virtue of a *fi. fa.*, and in the sheriff's custody; the extent coming before a bill of sale made, so as the property was not altered". In *Rex v. Peck* (a) this precise case happened; the issuing of the extent after the writ was delivered to the sheriff, and before the sale of the goods; and there it was taken for granted that though the goods were levied by virtue of the *fieri facias* three days before the teste of the extent, yet that was no bar to the crown; and it is also added there, " but *quære* if they had been sold, for then execution had been executed". So here the sheriff had not executed a bill of sale, and consequently the property of the goods was not altered as against the king; for whenever the goods are in the custody of the law, as was held in *Rex v. Cotton*, though the subject cannot take them in execution, the king may. And that the king is not bound by the inception of an execution is further apparent from the case of a commission of bankrupt, which is considered as a statute execution; for if the messenger has entered under a commission of bankrupt, though the property is not liable to be taken on a subsequent execution of a subject though on a judgment recovered before the commission, yet the king is not bound if his extent come before a provisional assignment. *Lechmere v. Thoroughgood* (b). All these authorities are directly in opposition to the case of *Uppom v. Sumner*, which is the first case in which it was solemnly determined that the statute of *Hen. 8.* extended to goods as well as lands; but if the construction contended for on the part of the defendant be the true one, all the cases previous to that of *Uppom v. Sumner* may be reconciled, and all apparent contradictions will be avoided.

In reply. It was said that the question was reduced to this, whether if the king avail himself of the prerogative execution given to him by the statute 33 *Hen. 8.* he must not take it subject to the restriction with which it was conferred. And therefore however doubtful it might be whether the provision of this statute extend to all debts due to the king, it does certainly extend to this particular one. At common law the king could only take by record (c), and therefore before an extent could issue the debt must have been found by inquisition. And even now the mode in the exchequer is this as to simple contract debts; on

(a) *Bunb.* 8.(b) 3 *Mod.* 236. and *Comb.* 123.(c) *Gilb. Hist. Ex.* 109, &c.



an affidavit of the debt due to the king a commission is directed to inquire of it, and, on inquisition returned, the debt is recorded, and an extent issues. But there is this difference between an immediate extent and an extent in aid; that the first issues before judgment, the other not till afterwards. This act of 33 *Hen.* 8. was therefore passed to avoid the delay which was occasioned by the ordinary process in bond debts due to the king, and the statute put them upon the same footing as debts on record, by which the goods are bound by the delivery of the king's writ from the teste of it. But in doing so the Legislature had some regard to the interest of the subject, and therefore they restrained the king's prerogative in this respect to cases where the subject had not recovered judgment before the commencement of the king's suit; for in other cases where the king's debt was on record, the subject might be supposed to be cognizant of it, and should therefore be bound by it. But the king never had the same prerogative with respect to bond debts before the statute; and this distinction will reconcile all the cases which have been cited relative to the preference due to the king's extent, if it come any time before execution actually executed. Cases of supposed absurdity and inconvenience have been stated, grounded on the statute of frauds; but the fallacy proceeds from supposing that the right to the goods is acquired by the judgment alone, and that the statute of frauds gave a right which the subject had not before: but that statute, instead of giving a right, restrains him in a case where he had a right before, by declaring that his debtor's goods shall only be bound by the delivery of the *fiери facias* to the sheriff, instead of the teste of the writ. And it is for the benefit of the king that he is not within the statute of frauds, inasmuch as his title is not restrained by it. Taking both statutes together, the result is this, that, prior to the statute, if the king's writ under the statute of *Hen.* 8. were teste'd before the subject obtained judgment, the king's title would be preferred; since the statute of frauds the king will have the priority, if his writ be tested before the writ of execution of the subject be delivered to the sheriff. The cases put by the defendant's counsel proceed on confounding the distinction between the cases of priority between subject and subject, and between the king and a subject. And as to commissions of bankrupt, the property is changed as to the subject by the seizure under the commission, though not against the crown till an assignment. Sir *Edward Cooke's* case (a), and

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(a) 2 *Roll. Rep.* 295.



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*Petit v. Benson* (a) do not apply, and were indeed merely cited for some general loose *dicta*. In 2 *Show.* 481. the question was whether the king's writ were tested before the other; and neither that, or *Bunb.* 8., arose on the statute of *Hen.* 8. So the case of *Rex v. Cotton* (b) was that of a distress, which is a mere pledge, and not the case of an execution: The property is not divested out of the original owner by a distress, and that was the ground of the judgment. If the reasoning of the court there proceeds further, it is merely with respect to the ordinary prerogative of the crown at common law, and not with reference to the new prerogative acquired under the statute of *Hen.* 8. and restrained by a particular condition, which was not complied with in this case. Perhaps the true construction of that statute is to be collected from the nature of the debt: but it clearly extends, where it does apply, to executions against goods as well as against lands; and by confining the argument to cases under this statute none of the authorities will be broken in upon.

Lord KENYON, Ch. J. This is undoubtedly a case of great importance, because it respects one of the prerogatives of the crown, existing in the crown for the public good. For the prerogatives are not given for the personal advantage of the king, but they are allowed to exist because they are beneficial to the subject. They are therefore to be guarded on account of the public; they are not to be extended farther than the laws and constitution of the country have allowed them; but within those bounds they are entitled to every protection. If we entertained any doubt on this subject, I should desire that this case might be turned into a special verdict, in order that it might be carried to the court of dernier resort, if the parties should be dissatisfied with our opinion. But as this point has been already determined in the court of Common Pleas after great deliberation, and as our opinion concurs with that decision, it would be a hardship on the plaintiff to compel him to go through another expensive litigation, before he could reap the fruits of his judgment.

I confess, I do not think this a case of difficulty. I believe the judgment in *Uppom v. Sumner* is warranted by the authorities which are there mentioned as its foundation. In giving my opinion, I therefore refer in general to the authority of that case, and to all the cases there mentioned; not however without ex-

(a) *Comb.* 452.(b) *Parker* 112.



aining the grounds on which they may be supported. Now where the king and a subject stand in equal degree, there is no doubt but that the king's prerogative must prevail: and, therefore, wherever the property in the goods remains in the king's debtor at the time, and an execution at the suit of the king and another at the instance of a subject are sued out, the former will be preferred. On this principle the case of *Rex v. Cotton* proceeded: that was not the case of an execution but a distress; the goods taken were in *custodiâ legis*, as a pledge, to answer the demand of the landlord, and the property in the goods was not divested out of the tenant. So, the case put at the bar of an execution issuing after a commission of bankrupt will fall within the same rule. The case supposed was this; the commission of bankrupt issued on the 1st of *January*; a *fieri facias* on the 1st of *February*; an extent on the second; and no provisional assignment till afterwards: In such a case it is said that the *fieri facias* comes too late, but that the extent does not. The answer given to it was not the true one; it was answered that the seizure by the messenger bound the goods with respect to the subject, but not with regard to the crown. In truth the seizure binds nothing: but, as far as respects the subject, the goods of the bankrupt are divested out of him, and vested in his assignees by relation from the time of the act of bankruptcy; but inasmuch as no relation operates to the prejudice of the crown, till a provisional assignment is made the king's prerogative attaches on that property, which, with respect to the king, remains the property of the bankrupt. The same principle extends to the other case put at the bar. But neither the one or the other of those cases breaks in upon the proposition which I stated at first, that as long as the property of the debtor remains unaltered, and an execution at the suit of a subject and an extent at the king's suit issue against the debtor, the title of the latter must prevail; For the point to be considered in these cases is, in whom is the property. I have always understood it to be clear and settled, (and this question has very frequently occurred in the exchequer), that, if an extent at the suit of the crown be teste'd prior to the time when the subject's execution is delivered to the sheriff, the former shall have the preference. But as by the common law, abridged as it is by the statute of frauds, the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor, on which the prerogative of the crown can attach. Now in this case the sheriff had actually

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seized the goods under the plaintiff's writ of execution; and an execution once begun shall proceed; it shall not stop on the issuing of a commission of bankrupt against the debtor; and in this respect I know no distinction between the case of the crown and that of a subject. On these grounds I am perfectly satisfied with the decision of *Uppom v. Sumner*, and that the plaintiff in this case is entitled to the postea.

As to the statute 33 *Hen. 8. c. 39. f. 74.*; either it did or did not give some new privilege to the crown: If the counsel for the crown contend that it did, they must take the word *execution* as referring to personal chattels, and then the words are against the king, because here there was a judgment by the plaintiff. If it did not introduce some new benefit, then the crown must be referred to its ancient prerogative, which only extends to the case I stated at first, namely, when the king and a subject stand in equal degree, and the property is not altered, there the former shall prevail. With respect to what is supposed to have been said by Lord Mansfield in *Cooper v. Chitty* (a) of Comberbach's having mistaken Lord Holt's opinion in *Lechmere v. Thorowgood*, it is as probable that the report of that observation is mis-stated.

ASHHURST, J. The case of *Uppom v. Sumner* certainly underwent a great deal of consideration before it was decided; all the prior authorities were thoroughly examined at that time. Unless therefore it could be shewn that that case proceeded upon wrong principles, it ought to govern the present. But in my mind no substantial objection has been made to that determination. The words of the statute *Hen. 8.* are clear and decisive, that the king's suit shall be preferred to that of any other person, "so always that the king's suit be taken or commenced, or process awarded, before judgment given for the said other person or persons." Now this act of parliament gave a new prerogative to the king in various instances which he had not before; by that he is enabled to issue immediate execution in cases where he could not before; for before he had only a right to such execution when the debt was upon record. And, as this was a new prerogative, the Legislature had a right to restrain him, and they have in express terms restrained him where the subject's judgment is prior to the inception of the king's execution.

BULLER, J. This case arises on the statute 33 *Hen. 8.*; for previous to that act the crown could not issue immediate execution on a bond debt; and therefore perhaps it might be sufficient

(a) 1 Burr. 36.



to confine the judgment of the Court to this particular case. Though the cases that have already happened on this statute shew that the act is not to be confined to bond debts only, but that it extends to all debts and executions: it is so stated in express terms by Lord Coke, in Sir T. Cecil's case (a). With regard to the three cases put in argument at the bar, of a commission of bankrupt, a distress, and a statute staple, I lay them entirely out of the case; because they do not fall within the words of this act of parliament, which applies singly to a case where a judgment is given. If this act of parliament be restrictive on the crown, it goes a great way to determine this question; for if it be, it expressly requires that the king's suit shall be commenced before judgment is given for the subject. Now that was expressly decided in the case in *Hardres*, where the whole Court were of opinion that the statute does abridge the king's prerogative. And there Chief Baron Steel said "The subject's title is prior to the king's, and is executed." On this ground I put the question to the counsel in argument, "What effect a judgment obtained by a subject would have, where he lay by till the king's extent were executed?" I am inclined to think that in such a case the execution by the subject would be postponed: but it is not necessary to decide that point in the present case. It is observable that it is said in the case in *Hardres* that the king is only to be preferred to the subject, when they both stand in equal degree. So too in 9 Co. 129. b. it is said, *quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet*. So that there appears to be great weight in the words of the Lord Chief Baron, in *Hardres*, that the execution of the subject must be executed. As to the effect of the statute 33 Hen. 8. c. 39. it is impossible to have a more direct authority for the restriction on the king's prerogative than that in 7 Rep. 19. b.; where it is said, that "The act hath given a benefit and advantage to the king; 1. In making every bond made to the king in nature of a statute staple. 2. In giving remedy to the king himself for obligations made to others to his use. 3. To recover costs and damages. 4. In suing of execution for all his debts. 5. In charging the issue in tail, and the heir who hath the land of the gift of his ancestor; and therefore it was the intent of the act to gratify the subject, that where a new provision was made for the levying of the king's debt in a more speedy and beneficial manner than the king had before, the subject

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(a) 7 Rep. 18. b.



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also should have some new benefit which he had not before." Now that new benefit was to give him a preference in cases where his judgment was obtained before the extent of the king issued. This is the fullest exposition of the statute *Hen. 8.* In this case therefore I am clearly of opinion that the plaintiff is entitled to judgment.

GROSE, J. The simple question is this, whether the king's right of issuing an extent upon a bond supercedes a prior judgment of a subject. If the crown have such a right, it must arise on the statute 33 *H. 8. Gilb. Hist. Exch.* 165. Now the words of this clause in the act are extremely pointed to shew, first, what the king's prerogative was before; secondly, how far the prerogative was intended to be assisted in these cases; and how far to be limited. But it is said that "execution" in this act was intended only to affect *lands*: but there is no reason why it should be so confined; it must mean every kind of execution, to which the king was entitled before the passing of this act, otherwise the king would be bound in cases where he had a prerogative before. Thus this case stands on the words of this statute. The authorities also are decisive. First, the case in *Hardres* is very pointed; and there it was not even hinted that execution in this act ought to be confined to an execution against land. Then came the case of *R. v. Dickinson* (a). And Lord Chief Baron Comyns (b) drew this conclusion from the cases, that "If execution be upon a judgment against the king's debtor, and before a *venditioni exponas* an extent comes at the king's suit, those goods cannot be taken upon the extent." Therefore as well on the decisions, as on the construction of the statute 33 *Hen. 8.*, the plaintiff is entitled to recover.

*Postea* to the plaintiff.

(a) *Park.* 262.

(b) 2 *Com. Dig.* 538. (G. 8.)

Tuesday,  
Nov. 15th.

### KING *qui tam* against SMITH.

The printer of a newspaper, publishing an illegal proposal for gambling in the lottery, incurs a penalty under the 22 *G. 3. c. 47. s. 13.* which enacts that no person shall sell the chances of tickets &c, nor publish any proposal for it, under a penalty of 50*l.*

THIS was an action of debt to recover two several penalties of 50*l.* under the 22 *Geo. 3. c. 47.* The first count in the declaration stated "that after a certain lottery was authorized and appointed to be drawn in pursuance of an act passed in the 30th year of the present reign, and before the tickets and lottery

were



were begun to be drawn, &c., on &c., the defendant published in a certain newspaper, entitled "The World", a certain printed paper and advertisement, purporting to be a proposal, and to be made by certain persons under the description of *Sbergold and Co.*, for the purpose of receiving divers sums of money from any persons willing to advance the same to the said *Sbergold and Co.*, in consideration of certain agreements to be made between the said *Sbergold and Co.* and the persons advancing the said sums of money, to repay to the said persons certain other sums of money, on ~~the~~ chances and events relative to the drawing of the fortunate tickets in the said lottery." The declaration then set forth the advertisement verbatim; adding contrary to the form of the statute &c. The second count was for publishing another proposal by *Margray and Co.* "for the purpose of receiving sums of money in consideration of certain agreements to repay certain other sums of money on certain chances and events relating to the drawing of tickets"; &c. The defendant pleaded *nil debet*. And at the trial before Lord *Kenyon* the jury gave a verdict for the plaintiff for both the penalties, subject to the opinion of this Court, on a case; which stated that the defendant, who was the printer of "The World," published the proposals stated in the declaration as advertisements; and that he had no interest or benefit in the publication but as the printer of the newspaper.

*Lowndes*, for the plaintiff, contended that the defendant was liable for both penalties, as well on the words as the spirit and meaning of the 22 Geo. 3. c. 47. s. 13; by which, "in order to prevent all adventuring with lottery tickets other than such as arise from the real and actual sale of tickets, and of such shares as are thereby permitted, it is enacted that it shall not be lawful for any person to sell the chance of any ticket &c., or insure for or against the drawing of any ticket &c., or to PUBLISH any proposal for any of the purposes aforesaid," under the penalty of 50*l.* for every offence. The words themselves are general, and comprehend all persons whatever. And the defendant has committed an offence also within the spirit of the act; the object of which was not only to prohibit gambling contracts in the lottery, but also to prevent any person publishing to the world any proposal upon the subject, containing information upon what terms these illegal contracts could be entered into. But if the printers of the public papers may still publish these schemes to the world, the object of the act will

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will be defeated; since they have better opportunities of conveying this kind of information to the public than the lottery office-keepers themselves. And if only the latter were liable to the penalty, it never would be recovered, there being none but clerks or servants visible in these offices. The preamble to this clause fully states the mischief intended to be remedied, namely, the preventing of all adventuring in the lottery, except as is therein allowed; and the means to effect that are, describing with accuracy the several offences, that no person should sell the chance of a ticket for less than the whole time of drawing, nor insure &c, nor form any contract relative to the drawing of such tickets, *nor publish any proposal* for any of the purposes aforesaid; and inflicting a certain penalty on the breach of this law. Now if the Legislature had intended to confine the operation of the last words to lottery office-keepers only, they would have added words to this effect, "nor publish any of their own proposals." In other acts of parliament on this subject, it is clear that the Legislature meant to punish not only the contrivers of these illegal schemes, but also the printers and publishers of them. By 8 Geo. 1. c. 2. it is enacted that no person shall set up any office for the improvement of small sums of money under the denomination of sales &c, nor sell &c, by way of lottery &c, nor make, print, advertise, or publish, or cause to be made, printed, advertised, or published, proposals or schemes for those purposes. Then by 19 Geo. 3. c. 21. §. 7. it was enacted that no person should under any pretence whatsoever promise or agree to pay any sum of money upon any chance or event relating to the drawing of any ticket in the lottery, *or should publish any proposals for any such purposes*. Now the Legislature, in passing this last act, must be supposed to have known the provisions of the 8 Geo. 1. c. 2. in which a distinction was expressly made between the makers of the proposals and common printers; and in the last they omitted the words against the proposers, considering the actual publishers, of whatever description, as the persons whom they intended to subject to the penalties of that act. Then the same words in the present act, which was made on the same subject, ought to receive a similar construction. If it be objected that this act was passed merely with a view of licensing lottery office-keepers, and regulating the sale of lottery tickets, as the title of it imports, and therefore that its provisions ought not to be extended to other persons, it may be answered that it is not peculiar to this act of parliament



parliament, there being several others which profess to be made for the purpose of regulating particular trades, and which nevertheless contain regulations affecting the Public at large: one instance is the 1 Jac. 1. c. 22. "concerning tanners, curriers, shoemakers, and other artificers occupying the cutting of leather," which was held in *Rossel, qui tam, v. Kitchen* (a) to extend to all persons whatever, and was not confined to persons engaged in the trade of cutting leather: and there Lord Mansfield observed "This would not have remedied the evil, or answered the end of the act: for the evil is just the same if any other persons commit this offence." So here unless all persons are prohibited publishing these proposals, the end of the act will not be answered, since the mischief to the Public will be the same, whether the schemes be published by the proposer himself, or by any other person. Another instance is the 3 Geo. 1. c. 13. in *Kimber, qui tam, v. Blanchard* (b).

*Conste*, for the defendant, first attempted to shew that the proposals themselves were not prohibited by the act: but, on advert- ing to them, the Court were clearly of a different opinion, as the purchasers of tickets were not entitled to all the prizes in the lottery, but only to such as were above 20*l*. He then observed that though the Court would, on the one hand, take care that this act of parliament was not evaded, they would not on the other hand extend the provisions of a penal statute beyond the words and fair import of it. Then, considered in that view, the defendant has not incurred any penalty under this act; for, as it is stated in the case that he had no interest whatever in the proposals, he did not publish them *for any of the purposes aforesaid*, which words are of the very essence of the crime. The plaintiff's argument is founded on a supposition that the prohibition to publish these proposals is contained in a separate and independent clause in the act; and that, as it restrains all persons whatever, it necessarily includes in it persons of the defendant's description. But it is to be recollected that it is a continuation of the section, which declares that no person shall sell any chance &c, or publish any proposal for the purposes aforesaid, under a penalty: the Legislature therefore seem to have confined the offence to persons engaged and interested in these illegal schemes. With regard to the difficulty of finding the principal offenders, the lottery office-keepers; it is answered

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by saying that the very advertisement itself refers to the houses where these schemes are made: but even if it were impossible to trace out the real offenders, that is no reason why other persons, who are innocent, and who have not offended against this act of parliament, should be punished for them. In the cases cited from *Burrow's Reports*, the defendants were respectively guilty of the offences, and the only objection was that they were not called by the same description of persons as those mentioned in the several acts: but here the defendant is not guilty of any offence, since the thing prohibited to be done is the publishing of any illegal scheme by a person interested.

Lord KENYON, Ch. J. This is not the first instance in which the Legislature has inflicted a penalty on a public printer for advertising the thing prohibited. For by the 25 Geo. 2. c. 36. it is enacted that any person publicly advertising a reward, with no questions asked, for the return of things stolen or lost &c, and any person printing or publishing such advertisement, shall respectively forfeit the sum of 50*l*. On attentively considering the act of parliament, on which the present action is brought, I see no reason why we should not give effect to the general words which prohibit the publishing of these illegal proposals. Public policy certainly requires that the deluded multitude should not be inadvertently led to places of this kind, where they are so grossly imposed upon. It is not a matter of indifference to the Public that this poison should be disseminated through so many different channels; and if these proposals were not circulated so industriously, the mischief would not be so extensive as it is. Then it is objected that the words of this act are too general to affect the printer of a public newspaper, who has no interest in the schemes: but, if the Legislature had been anxious to include public printers, what words, besides those which they have used, could they have inserted in this act; they have said "if any person shall *publish* &c," not "cause to be published," which they would have said, had they intended only to inflict the penalty on the makers of the schemes. In this case it is expressly stated that the defendant published the proposals in question; and there is nothing in this act of parliament to induce us to narrow the general construction of the word "*publish*." In prosecutions for libels the printer is undoubtedly answerable; if he print the libel, and send it forth into the world, he is the publisher. I think that the intention of the Legislature was to prevent the circulation of such advertisements in any way; and that



this is an offence as well within the meaning as the words of this act of parliament.

BULLER, J. (a) There is great weight in the observation made by the plaintiff's counsel on the different words of the several acts referred to. The 8 Geo. 1. c. 2. shews the meaning of the word "publish;" for by that act the penalty is inflicted on those who "print or publish," or "cause to be printed or published." There the Legislature distinguished between the publishing, and the causing to be published; between the actual printer, and the person interested in having the advertisement published. Now this act of parliament being in *pari materia* with the former, and the same word "publish" being used in both, it is a legislative exposition of the sense in which it is to be understood in this act. "Publishing" in the former act extended to the mere act of publication; and so it does in this.

GROSE J. The intention of the Legislature appears to have been, not only that chances &c, in the lottery should not be sold, but also that the Public should not be informed where such chances &c, could be purchased. And they enacted that no person should publish these proposals to the world, that the poor and ignorant sort of people might not know where these transactions were going on. Therefore I am of opinion that the defendant has incurred these penalties both within the meaning and the words of this statute.

Lord KENYON then said he wished to have it understood that the distributor of hand bills to this effect would be equally criminal within the meaning of the act.

*Per Curiam.*

Postea to the Plaintiff.

(a) *Ashburst. J. abs.*

### The KING against T. KNIGHT.

Wednesday,  
Nov. 16th.

**T**HIS was an information in the nature of a *quo warranto*, calling on the defendant to shew by what authority he exercised the office of a burghers of the borough of Newcastle-under-Lyme, Staffordshire; to which he pleaded that the borough of Newcastle-under-Lyme is an ancient borough; That

To a *quo warranto* information the defendant derived a title in his plea to the office of a burghers un-

der a custom for the common council to admit, *ad libitum*, any person of the age of twenty-one, whom they chose: The prosecutor, after denying that custom, replied that no person was entitled to be admitted but in right of servitude, and that the defendant had not served a seven years apprenticeship; rejoinder stating the special circumstances under which he had served. On a demurrer to this rejoinder, because it was a departure from the plea, the Court held the replication itself to be bad, as immaterial to the title in the plea, and gave judgment for the defendant.

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the burgesses of the said borough were a corporation by prescription under various names of incorporation, and from the time of granting and acceptance of the letters patent herein-after mentioned have been and still are a body corporate, by the name of the mayor, bailiffs, and burgesses of the said borough; and that during all that time there has been an indefinite number of burgesses. That Queen *Elizabeth* by her letters patent dated *May* 18th, in the 32d year of her reign, reciting amongst other things that the burgesses of *Newcastle* were a corporation by prescription, and had immemorially enjoyed certain jurisdictions, franchises &c, constituted and granted (amongst other things) that her borough of *Newcastle* should be a free borough, and that the burgesses of the said borough should from thenceforth be one body corporate and politic, by the name of the mayor, bailiffs, and burgesses, of the borough of *Newcastle-under-Lyme*: and she thereby further granted that there should be for ever thereafter one mayor and two bailiffs of the borough; *that there should be within the borough twenty-four men of the more discreet and better sort of people of the said borough, who should be aiding and assisting the mayor and bailiffs for the time being, in all causes and concerns touching the said borough, and who should be and be called the Capital Burgesses of the borough, and with the mayor and bailiffs of the said borough should be the common council of the borough* for making and ordaining from time to time by themselves, or the greater part of them &c, together with the mayor and bailiffs for the time being, all statutes, acts, and ordinances, touching and concerning the public good, government, and advantage of the borough &c. That Queen *Elizabeth* further granted that the mayor, bailiffs, and capital burgesses, being the common council of the said borough, should have power &c, to make such laws, institutions &c, as should appear good, necessary &c, for the good order and government of the mayor, bailiffs, and capital burgesses, and all other the burgesses and inhabitants of the said borough for the time being; and also for the shewing in what manner and order the said mayor, bailiffs, and capital burgesses, and all and singular other the ministers, officers, burgesses, artificers, inhabitants, and residents, of the borough should hold, behave, and conduct, themselves in their offices, functions, and employments, trades, and business, within the said borough. That Queen *Elizabeth* by that charter nominated the first mayor, bailiffs, and twenty-four capital burgesses; and further granted



that the mayor, bailiffs, and capital burgeses, should have power &c, to make laws &c, for the direction and declaration in what manner, place, order, and course, the mayor, bailiffs, capital burgeses, and also all other the officers of the said borough should thereafter be chosen, nominated, and preferred to the places or offices of mayor, bailiffs, capital burgeses, and other offices &c. and by what and whose suffrages and voices, and for the appointing and determining how many, and which, and who, of the burgeses of the said borough should for ever thereafter have affirmative or negative voices in the nomination, election, or appointment, of the said mayor, bailiffs, capital burgeses, and other officers, of the said borough, as often as those offices should be vacant; and also for the shewing with what and which ceremonies and solemnities they should enter upon and take their several offices. The plea then stated that that charter was duly accepted &c; that the persons therein named took upon themselves the several offices &c; and that since that time there have been one mayor, two bailiffs, and twenty-four capital burgeses, of the said borough. It then stated this custom "that the *mayor and burgeses of the said borough in common council assembled*, or the major part of them, *under their various names of incorporation*, from time immemorial until the granting and acceptance of the said letters patent, *and the mayor, bailiffs, and capital burgeses, in common council assembled*, or the major part of them, since the granting and acceptance of the said letters patent, have used and been accustomed to admit and swear, and the said mayor and burgeses in common council assembled, or the major part of them, under their various names of incorporation, during all that time until the granting and acceptance of the said letters patent of right ought to have admitted and sworn, and the said mayor, bailiffs, and capital burgeses in common council assembled, or the major part of them, since the granting and acceptance of the said letters patent, hitherto of right ought to have admitted and sworn, and the said mayor, bailiffs, and capital burgeses in common council assembled, or the major part of them, still of right ought to admit and swear as a burges or burgeses of the said borough, such person or persons, having attained the age of twenty-one years, as the said mayor and burgeses in common council assembled, or the major part of them, before the granting and acceptance of the said letters patent, and since the granting and acceptance of the same, such person or persons, having attained the age of

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twenty-one years, as the said mayor, bailiffs, and capital burgeses in common council assembled, or the major part of them, have thought, or may think, proper at their discretion, to wit, at, &c. on &c; and that every person so admitted and sworn a burges of the said borough, from the time of his being so admitted and sworn hath always from time whereof &c. used and exercised the said office &c." The defendant then deduced a title under this custom.

The replication first denied the defendant's admission, as stated in his plea; and also the custom under which he claimed; and then stated a custom that persons duly qualified according to the custom of the borough have been admitted and sworn burgeses by right of servitude, and that no person hath been or ought to be admitted, unless he hath served an apprenticeship for seven years under a legal indenture to some person residing in the borough. It then stated another custom that "every person admitted and sworn a burges hath been admitted and sworn according to the right and title by which he hath claimed to be admitted to such office, *and not otherwise*." It then averred that the defendant claimed to be admitted in right of servitude, and was admitted in that right, not having served an apprenticeship for seven years to any persons residing in the borough; traversing that the defendant was admitted as a person whom the mayor, bailiffs, and burgeses, thought proper in their discretion to admit. Another replication, after stating these two customs, averred that the defendant claimed to be admitted in right of servitude, and was accordingly admitted, not having served an apprenticeship for seven years under a legal indenture to any person residing in the borough, wherefore his admission was wholly void.

The defendant, in his rejoinder, after joining issue on the two first issues tendered by the replication, took issue on the traverse of his having been admitted by the mayor &c. as a person whom the mayor &c. in their discretion &c. (a). He then, after protesting against both the customs alleged in the replication, and protesting also that he was not admitted in right of servitude, rejoined, that before his admission, being under the age of twenty-one years, to wit of the age of fifteen years, he was by an indenture of apprenticeship, dated 8th February 1772, duly executed by one William Carr as churchwarden of Newcastle, and J. Smith, overseer &c. with the assent of two justices of the borough, put and placed as a poor child of that parish,

(a) At the trial the defendant obtained a verdict on these three issues.



to *T. Welch* of that borough as an apprentice till the defendant should attain the age of twenty-three years; that he duly served under that indenture within the borough till 3d of *April* 1778, that before his apprenticeship expired, to wit, on 3d *April* 1778, he absented himself from the service of *Welch*, and continued absent until the expiration of his apprenticeship. That within seven years next after the end of the term for which he was bound, to wit, on *September* 13th 1783, the defendant returned into *Welch's* service, and duly served him as an apprentice within the borough for so long a time as he had absented himself, according to the statute (a) &c.; and that the defendant had not made satisfaction to *Welch* for the loss which he had sustained by the defendant's absence from his service.

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To this there was a special demurrer, because the rejoinder did not fortify the matter by the defendant pleaded in bar, but alleged new matter contrary to the plea, and was a departure therefrom; that the defendant did not by his rejoinder set forth any custom or any other title by or under which any person, having served an apprenticeship, is intitled to be admitted into the office of a burgess; that it does not appear by the rejoinder that the defendant at any time served an apprenticeship for seven years under a legal indenture to any person residing in the borough, &c.

*Topping*, in support of the demurrer, argued that the rejoinder could not be sustained, because it introduced matter repugnant to the matter contained in the plea. In the latter, the defendant rested his title on a custom for the corporation to admit *ad libitum* as many as they pleased; and in the rejoinder he relied on a title in right of servitude. The title set up by the plea is expressly negatived by the replication, for that alleges a custom that no person ought to be admitted, unless he has served an apprenticeship for seven years; that persons are admitted according to the right in which they claim, "and not otherwise"; and that the defendant claimed to be admitted in right of servitude. The defendant therefore might have rejoined consistently with the title set up in the plea, by traversing that he was admitted as stated in the replication. In a *quo warranto* information it is incumbent on a defendant to make out a complete title; and, if having two separate titles, he elect to rest his defence on one, in which he fails, there must be judgment of ouster against him, though, had he relied on the other, he would have succeeded.

(a) Vide 6 Geo. 3. c. 25.



1791. *Rex v. Leigh, 4 Burr. 2143.* Here the defendant at first elected to rest his whole title on the general custom stated in his plea; and, as he chose to abandon that in his rejoinder, and rely upon another title, there must be judgment against him.

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Lord KENYON, Ch. J. (stopping *Leicester* on the other side.) The defendant is called upon by this information to shew by what title he exercises the franchise of a freeman of *Newcastle*. The defendant alleged in his plea a custom in the corporation to confer the freedom of the borough on any persons of the age of twenty-one *ad libitum*, and that they had conferred that title upon him; both these propositions were denied by the replication; issues were taken upon them, and both were found in favor of the defendant. It therefore appears upon the record that he has a title to this franchise. It is true, indeed, that another title, totally irrelevant to this question, has crept into the record: but the replication which introduces this foreign matter, cannot be supported; and perhaps the rejoinder is as bad: but the defendant was led astray by the misleading in the replication. If indeed it had appeared upon the whole record that the defendant had no title, there must have been judgment of ouster against him: but it does appear on this record that he has a good title, and therefore he is entitled to judgment.

ASHHURST, J. The custom stated in the plea being general to admit every person of the age of twenty-one whom the corporation chose, without any restriction, the other custom set up in the replication is immaterial, and does not go to decide upon the title on which the defendant relied.

BULLER, J. The question before us is not so much whether the rejoinder be bad, as whether the replication, to which the rejoinder is an answer, can be supported; and I think it cannot. The defendant in his plea rested his title on a custom in the corporation to admit any person at will: now if that custom, as alleged, be true in fact, it is perfectly immaterial whether any person may be admitted in right of servitude. Thus much is sufficient for the decision of this case. But I wish that the gentlemen of the bar, who draw the pleadings in cases of this kind, would attend in future to the mode of replying on the part of the crown. A prosecutor in a *quo warranto* information is allowed to reply specially, and to put as many matters in issue as he pleases: but the new matter, introduced in the replication, ought to be consistent with the matter contained in the



the plea. If, for instance, a defendant set up a bad title under an old charter, when in fact a new charter has been granted, altering the old mode of election, the Crown may introduce the new charter in the replication, because it is consistent with the matter contained in the plea, but there is something to be superadded to that matter. But in this case the new matter alleged in the replication is not consistent with the defendant's plea; and if the plea be true, that which is stated in the replication is totally immaterial. And this practice, which is an abuse of the privileges of the crown, ought to be checked; since, if permitted, it would be productive of great oppression to the subject.

## Judgment for the defendant.

*Bower* then moved to enter up judgment for the crown, notwithstanding the issues were found for the defendant, because the custom, on which the defendant relied in his plea, could not be supported in point of law. Cause was afterwards (a) shewn against this rule by

*Adair*, Serjt., *Bearcroft*, *Erskine*, *Wood*, *Leicester*, and *Broderick*. The objection is that the right of admission exercised since the charter is so essentially different from that exercised before, that it cannot be considered as a continuation of an immemorial usage. But a prescription may continue in the same body, though the individuals composing that body be not the same; and that is the substance of this custom. In *Luttrel's* case (b) it is said "If a corporation have franchises or privileges by grant or prescription, and afterwards they are incorporated by another name, as where they were bailiffs and burgesses before, now they are mayor and commonalty; or prior and convent before, and afterwards they are translated into a dean and chapter; although in these cases the quality and name of their corporation are altered and changed, yet the new body will enjoy all the franchises &c. which the old corporation had either by grant or prescription." So in *Bro. Abr. "Prescription"* pl. 70. "If a prior be made an abbot, in pleading a prescription he must say that the prior and his predecessors from time whereof &c. till he was professed an abbot, and that since that time the abbot and his successors have been seised, &c." The alteration therefore of the name or quality of the

been always exercised by the same body, *sc.* the common council, though constituted of different persons at different times.

(a) On Wednesday, November 23.

(b) 4 Rep. 87. b.

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The defendant in a *quo warranto* information derived title under a custom for "the mayor and burgesses of N. in common council assembled under their various names of incorporation from time immemorial till the granting of letters patent by Queen Elizabeth, and for the mayor, bailiffs, and capital burgesses in common council assembled since that time" to admit every person of the age of 21, whom they chose; after verdict for the defendant establishing this custom, the Court held it well pleaded, it appearing to them to have



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body does not destroy the prescription. Then the only question here is whether this is not a continuation of the same body, "the common council;" and that it is so appears from the language in which the custom is pleaded. It is stated that the mayor and burgeses in *common council assembled* from time immemorial till the granting of the charter, and the mayor, bailiffs, and capital burgeses, in *common council assembled*, have since that time admitted &c. By this it appears that the right of admitting freemen has always existed in the common council, of whatever description of persons that body was composed, and not in the body at large; the only difference being that prior to the charter the common council consisted of the mayor and burgeses, and since that time of the mayor bailiffs and capital burgeses. It is also to be remembered that this is a motion after verdict; and the finding of the jury could not be true, if that were otherwise; for by their verdict they have in substance found that the mayor and burgeses constituted the common council of the borough before the charter, and that such common council had immemorially admitted freemen. The words "in common council assembled" are so descriptive of the body thus assembled that a meeting of the mayor, bailiffs, and burgeses, (who it is admitted compose the common council under the charter) is stiled a meeting "of the mayor, bailiffs, and burgeses in common council assembled." Then similar words used in the same custom ought to receive a similar construction. In *Haddock's* case (a) it was said, "if a corporation, that hath been by prescription, accept a new charter, wherein some alteration is of their name, and likewise of the method in the governing part, yet their power to remove, and other franchises which they had before, do continue." Then in this case the power to admit, which was vested in the common council prior to the charter, continues in the common council under the charter, notwithstanding an addition has been made to that body, and notwithstanding the method in the governing part of the corporation was altered by the charter.

*Bower, Lane, Manley, and Topping*, in support of the rule. It is not contended that the ancient custom, which existed prior to the charter, is destroyed, but it still remains in those, who formerly enjoyed it; for it was not vested by the charter in the common council which is a separate body, created by the charter for particular purposes only. And before the charter the right of

(a) 1 Vent. 355: and Sir T. Ray. 435.



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admission was in the whole corporation. The conclusion drawn by the counsel on the other side that the common council under the charter are invested with all the powers lodged in the common council before, and that the right of admitting freemen was lodged in the common council before, is neither warranted by the reason of the thing, or by the terms in which the custom is pleaded. The whole argument is fallacious; and the fallacy consists in the ambiguous use of the words "in common council assembled." The common council is a select body introduced into the corporation for the first time by the charter of *Elizabeth*, created only for particular purposes, and invested only with special powers. No such body existed in this corporation before that time; and the meaning of the phrase "the mayor and burgeses in common council assembled" is "a meeting of the whole corporation in common hall assembled." It is merely a description of the meeting; and is equivalent to "assembly." Sir Robert Sawyer, in his argument (a) of the "*London quo warranto* case, defines with great accuracy the meaning of these terms; "Upon the erection "of all corporations the power of assembling, deliberating, and "determining, for the corporation is either entrusted with a few "particular members whose continuance in that trust is directed "by the several charters, or with the whole body; and that "either expressly in plain words, or by implication of law, "when the charters are altogether silent therein: the law in such "case lodgeth the power of assembling, debating, and determining, for the corporation in all the members; and *the whole* "jointly assembled, or so many of them as upon notice shall appear, "constitute the common council; and such assembly is not stiled "the common council from being retained and giving counsel, "but they are so called from their joint assembling and consulting for themselves, who constitute the body politic." No such body as "a common council" is known by the common law; it must be created by charter, or exist by prescription, which pre-supposes a charter; and, it not being stated on this record that there existed such a body in the old corporation, the Court cannot presume it from the formal words of the general meeting of the whole corporation "in common council assembled." But even if this were doubtful on the words "in common council assembled," taken by themselves, all doubt is removed by the words which immediately follow, and are connected with, them, namely, "under their various names of

(a) Page 32. of his argument.

incor-



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incorporation." This of necessity means a meeting of the body at large, and cannot be taken to mean a select body, since it is not pretended that there ever was a sub-incorporation of any particular part of this corporation. The words "under their various names of incorporation" refer to "in common council assembled," and these latter "to the mayor and burgeses." The whole is descriptive of *one body assembled together under whatever name* by which it may have been called at any time: If therefore the words "in common council assembled" mean that the mayor and burgeses were assembled *as a common council*, the latter words "under their various names of incorporation" must also mean that that common council was incorporated, and had various names. But the plea states that the corporation were a corporation by prescription *under various names of incorporation*, to which only those words in the custom can apply. If then the right of admitting freemen were once vested in the body at large, as it is stated in the plea, it must still continue in them, unless it were given by the charter to the select body; and the defendant not having stated in his plea that the charter vested this right in the select body, it must now be taken that such is not the fact; since if the Court were to presume it, they must also infer that that right was taken away from the body at large. But upon this record every franchise which the whole body had before the charter must be taken to remain in them now, except those which were transferred by the charter to the select body. Now all the powers which the charter intended to transfer to the newly created common council are particularly expressed in the charter; but the right of admitting freemen is not one of them. The power given to the common council of making bye-laws for regulating the conduct of all the officers of the corporation only attaches on them *when* they are elected; and the power to make laws, declaring *the manner* in which all elections in the corporation should be made, does not of itself give them the absolute and exclusive right of admitting and swearing in. In *R. v. Spencer* (a) where the common council of *Maidstone* had made a bye-law, narrowing the number of the persons eligible, Lord *Mansfield* said "where the power of making bye-laws is by the charter given to a select body, they do not represent the whole community, and therefore cannot assume to themselves what belongs to the body at large." If therefore the common council of *Newcastle* had, immediately after the charter, made

(a) 3 Burr. 1837.



a bye-law confining the right of admission to their own body, it would have been void: but even if such a bye-law could have been supported, it is sufficient here to say that no such law is pleaded, and that the defendant in his plea says that that right is derived to the common council under the charter. It is also worthy observation that if the common council can succeed in this attempt to wrest into their own power this particular privilege, by the same mode of reasoning they will extend their pretensions to every other franchise, formerly enjoyed by the body at large, and by them said to be exercised in common council assembled, which the common council may have usurped since the charter; and their very usurpation will be converted into conclusive evidence of their legal right.

Lord KENYON, Ch. J. Many important arguments have been used on both sides; but on considering the whole I am of opinion that the rule must be discharged. And I do not think that the prosecutor had any sanguine expectations of success, otherwise he would have demurred to the defendant's plea. However, if on reconsideration he could discover any defect in that plea, he has a right to take advantage of it in this stage of the proceedings. But it is not to be forgotten that the verdict has established this as a fact, that as far back as can be traced, both before and since the charter of *Elizabeth*, the admission and swearing in (not the election) of freemen have been in the common council; and we are now called upon to say that every thing that has been done since the granting of the charter has been improperly done. Where no common council is established, the whole corporation may meet together, to consult about, and to decide on, their corporate rights; they may constitute a corporate assembly; but in technical language that is not called "The common council," nor are they said to be "in common council assembled." But it has been contended that those words mean only the form and description of the meeting; and we are now desired to say that all the meetings of the mayor and burgesses in common council assembled were meetings of the whole corporation: but it does not necessarily follow that those meetings were composed of the whole body corporate; and we ought not to conjecture that they were, merely for the purpose of overthrowing the proceedings of this corporation for the two last centuries. The whole argument seems comprised in the compendious form in which the defendant's counsel stated it, "that the right of admission prior to the charter was in the



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common council however constituted, and since that time has been in that body as constituted by the charter." And this is established by the finding of the jury. At the most, the words, upon which we are called upon to overthrow the usage since the reign of *Elizabeth*, are ambiguous; and if there ever was a meeting before the charter not consisting of the whole body, there is an end of the question. The new modification of the common council cannot make any difference; because, as the whole corporation accepted this charter, they assented to it. And by that acceptance the same powers which were exercised by the old body (among which is that of admitting freemen) are now vested in the new body.

ASHHURST, J. The jury having found that the custom for the common council to admit and swear in the burgesses of this corporation has uniformly existed since the charter, every intendment is to be made in favor of it. And I concur with my Lord in thinking that a meeting of the "mayor and burgesses in common council assembled" does not necessarily mean a meeting of the *whole* corporation. Now if it appear that prior to the charter of *Elizabeth* there did exist a body, called the common council, though differently constituted from the present common council, the defendant will be entitled to judgment. And I think that the interpretation put by the corporation on their ancient rights by uniform usage since the charter is a strong proof that there was such a body; and if it were necessary, it must now be presumed, otherwise the finding of the jury could not be right.

BULLER, J. The case of the *King v. Spencer* has no analogy to the present. There the question arose on a bye-law; and it was held to be bad, because it was made by a select body of the corporation, and varied the mode of election as directed by the charter. But a new charter granted by the crown, and accepted by the corporation, falls under a different consideration from the case of a bye-law; and therefore it is material that the charter of *Elizabeth* was accepted by this corporation. For whatever might be the original constitution of the borough, it was in the power of the crown, with the consent of the existing body, to alter the rights of the corporation in any respect. Now here the new charter was granted to the old body, the mayor and burgesses; and whatever alteration it made in the corporation, they must be bound by it, having accepted it; the last charter is therefore the governing law of the place. And I think that by that charter the new common council have the power of ad-

mitting



mitting and swearing in freemen; for it expressly gives to them power "to make laws for the direction and declaration in what manner &c. all the officers of this corporation shall be chosen &c, and by whose suffrages and voices." Besides which there is an usage for nearly two hundred years, consistent with the charter, and which ought still to prevail, if there be nothing on the record to contradict it. Now it is stated that prior to the charter the right of admission was in the mayor and burgesses *in common council assembled*: but the following words "under their various names of incorporation" have been relied on to shew that these were meetings of the whole corporation: but the name of the corporation cannot be material. Suppose the plea had stated the custom in a shorter mode than the present; that it had stated that there had been immemorially a body corporate, and a common council, and that the last body had immemorially admitted freemen. There could have been no objection to state it in this short way; and the custom, as stated in the present plea, is in substance the same; it only differs from it in introducing the different names of incorporation; and in stating who are the persons composing the common council; it means this, that the common council, however constituted, have immemorially exercised this right. There is great weight in one of the arguments used by the prosecutor's counsel that "a common council" is not noticed by our law, because every corporation has not a common council; but whether or not there be such a body, and what powers they have, must depend on prescription or charter. But in this case we must take it, after verdict, that there was such a common council as might legally have the right which it is stated in the plea that they have immemorially exercised; and that right is transferred to the new body by the charter, which was accepted by the whole corporation.

GROSE J. declared himself of the same opinion.

Rule discharged.

### COBDEN *against* KENDRICK.

Thursday,  
Nov. 17th.

**A**N action had been brought some time before by the present defendant, as indorsee of a promissory note for 150*l*.

An attorney  
is not re-  
strained by  
any rule of

law from giving evidence of a conversation between him and his client touching the justice of his suit after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to have been made by way of instruction for conducting his cause.

*against*

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against the present plaintiff as the maker; in which cause interlocutory judgment had been signed, and a writ of inquiry executed; after which the cause was compromised by Cobden's paying part, and giving a warrant of attorney to confess judgment for the residue of the 150*l.* (a) And in the interval between the time when the warrant of attorney was given and the time when the money became due, according to the defeasance thereof, Kendrick told Allen, who was his attorney in that suit, that he was glad it was settled, for that he had only given 10*l.* in cash, and his promissory note for it, and that he knew it was a lottery transaction. This action was now brought to recover back the money so paid on the ground of want of consideration; and in proof that that was known to Kendrick at the time he took the note. Allen was called as a witness at the trial to speak to the conversation above-mentioned, and he was admitted by Lord Kenyon after argument upon his incompetency; and a verdict passed for the plaintiff.

Law now renewed his objection, and moved for a new trial, on the ground that Allen had been improperly permitted to give evidence of the conversation between him and the defendant, his client; contending that Allen fell within the rule of law which prohibited an attorney from betraying the confidence placed in him by his client, which confidence lasts so long as any proceedings may be had in the cause. Here the proceedings were not completely at an end when the conversation was held. The party might still have proceeded to judgment in the original suit; and the attorney had still his lien for the costs. So that the relation of attorney and client in respect of the parties to the original suit was not determined at the time when the communication was made by Kendrick to Allen his attorney.

*Per Curiam.* The difference is whether the communication were made by the client to his attorney in confidence as instructions for conducting his cause, or a mere *gratis dictum*. The former was not the case here: on the contrary, the purpose in view had been already obtained; and what was said by the client was in exultation to his attorney for having before deceived him as well as his adversary, and for having obtained his suit.

Rule refused.

(a) Another objection was taken at the trial, that this action was in effect to put the same sum in litigation a second time, which had been recovered in the former action by Kendrick against Cobden; but Lord Kenyon over-ruled it on the ground that the money had been paid under a compromise, and not under the judgment of a court.



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CHARLTON *against* FLETCHER.Thursday,  
Nov. 17th.

**M**ANLEY had obtained a rule nisi for setting aside a warrant of attorney to confess judgment, upon the ground that it was executed by the defendant when in custody, and that no attorney was present on the part of the prisoner at the time.

*Baldwin* now shewed for cause that the defendant, at the time he executed the warrant of attorney, was not in custody at the suit of the plaintiff, but under criminal process; and cited *Holcombe v. Wade* (a), and *Gillman v. Hill* (b), to shew that the rule was confined to cases where the defendant was in custody at the suit of the party to whom he executed the warrant of attorney, for it was made to prevent oppression by dures of the imprisonment at the suit of the party himself.

The Court were clearly of opinion that the rule did not extend to the present case, and

Discharged the Rule (c).

(a) 3 Burr. 1792.

(b) Cowp. 141.

(c) Vide *Birch v. Sbarland*, ante 1 vol. 715. and *Parkinson v. Caines*, 3 vol. 616.YEA Bart. *against* LETHBRIDGE.Thursday,  
Nov. 17th.

**T**HIS was an action on the case against the defendant, sheriff of *Somersetshire*, for taking insufficient pledges in replevin. At the trial before *Buller J.* it appeared that the plaintiff had distrained on one *Rogers* his tenant, who replevied, and removed the proceedings into this court by a *recordari facias loquelam*; that *Rogers* having declared in replevin, the plaintiff avowed for rent in arrear, 84*l.*, and afterwards obtained judgment *de retorno habendo*; and to this writ the sheriff returned an eloignment. It also appeared that the pledges in replevin were insufficient. And the only question in the cause was what should be the amount of the damages to be recovered in this action against the sheriff; the learned judge thought the plaintiff could only recover 61*l.* 18*s.* the value of the distresses taken; but his counsel insisting that he was intitled to recover against the sheriff the amount of the damages and costs recovered against the plaintiff in replevin, which was 142*l.* a verdict was accordingly taken for that sum, leave being reserved to the defendant

In an action against the sheriff for taking insufficient pledges in replevin the plaintiff cannot recover damages beyond the value of the distresses.



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to move this court to reduce the damages to 61 *l.* 18*s.* if they should be of opinion that the plaintiff was only entitled to that sum.

A rule for that purpose having been accordingly obtained by *Gibbs*; it was now opposed by

*Lawrence*, Serjt, *Watson*, Serjt, and *Lens*; who argued that, as this was an action on the case, where the damages are in their nature uncertain, the plaintiff ought to recover so much as he had suffered by the sheriff's neglect in taking insufficient pledges, which they said was as much as the bail themselves would have been liable to under the statute 11 *Geo* 2. c. 19. §. 23. Now by that statute the sheriff is required to take sureties in double the value of the goods distrained, conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods distrained, in case a return shall be awarded: and, if the bond be forfeited, the court where the action is brought may give such relief to the parties upon such bond as may be agreeable to justice and reason. The measure of damages therefore in this case is that which the Court would have awarded according to justice and reason, if the bail themselves had applied for relief under this statute. And as not only the goods distrained were taken out of the plaintiff's hands, but as he was under the necessity of defending the replevin suit in order to obtain judgment for the redelivery of them to him, he would be intitled to the costs of that suit. Then the costs of the replevin suit, added to the rent in arrear, form the damage which the plaintiff has sustained in consequence of the sheriff's neglect of duty. The Legislature would not have required the bond to be taken in double the value of the goods distrained for any other purpose than that of protecting the party making the distress, and of indemnifying him against all expence in procuring a return of the thing distrained, in case he were justified in distraining; and the costs of the action of replevin are a necessary expence in procuring that return. In *Gibson v. Burnell*, 30 *Geo*. 3. in an action of this kind against the sheriff, *Gould*, J. before whom the action was tried, was of opinion that the plaintiff was entitled to recover the costs in the replevin as well as the rent in arrear. So too in *Prowse v. Patison* (a), which was one of the first actions of this kind after the 11 *Geo*. 2., it appears on inspecting the record that the amount of the damages given against the sheriff was the rent in arrear added to the costs of

(a) *Bull. N. P.* 60.



the replevin; but indeed it must be admitted that the whole of that sum did not exceed the value of the distress. In *Richards v. Aston* (b) it was taken for granted that the sheriff was liable for the damages and costs recovered by the defendant in the replevin suit; and there he was compelled to make satisfaction to that amount by a rule of court. This being an action on the case, the jury were not restrained to give merely the precise amount of the rent. Suppose the plaintiff, instead of bringing this action, had brought detinue for the goods, (which he might have done, 2 Hen. 6. fo. 15.) the jury might have given damages for the detention beyond the value of the goods. So in an action on the case against the sheriff for an escape, the jury are not limited to any certain sum, but may give not only the original debt, but damages also.

LORD KENYON, Ch. J. (Stopping *Rooke*, Serjt. and *Gibbs* on the other side). In order to see to what amount the sheriff is answerable, it is necessary to inquire what would have been the consequence if he had taken sufficient pledges. Now the duty of the sheriff, as prescribed by the act of parliament, is to take a bond for prosecuting the suit, and for a return of the goods distrained, if a return shall be awarded (b). Then if he had taken such a bond, how would it have been satisfied? by returning the goods taken: then the value of those goods seems to be the true measure of damages to be given in this action. In the case cited from *Bl. Rep.* the only question was who should be answerable: Nothing is there said respecting the quantum of damages; and it must have been by consent, otherwise the Court were assuming the province of a jury.

ASHHURST, J. and BULLER, J. assented.

GROSE, J. The duty of the sheriff is accurately pointed out by the statute *Westminster 2.* (c), which requires "that sheriffs shall not only receive of the plaintiffs pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return awarded. And if any take pledges otherwise, he shall answer for *the price of the beasts.*" And the 11 Geo. 2. does not enlarge the sheriff's responsibility in this respect.

Rule absolute.

(a) 2 Bl. Rep. 1220.

(b) 11 Geo. 2. c. 19.

(c) 13 Ed. 1. st. 1. c. 2. f. 3.

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LETH-  
BRIDGE.



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Friday,  
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The Court will not set aside a defendant's execution for the costs of a non-suit sued out after notice of allowance of a writ of error, because the writ of error can only be for delay.

KEMPLAND *against* MACAULEY and Another.

A Rule having been obtained, calling on the defendants to shew cause why their execution for the costs founded on a judgment of nonsuit should not be set aside, because it was sued out after the plaintiff had served them with the allowance of a writ of error,

*Erskine* now shewed cause; and relied on *Box v. Bennett* (a), where this very point was ruled by the court of Common Pleas after consideration, because (they said) the writ of error in such a case must evidently be brought for the purpose of delay and vexation.

*Garrow*, *contra*, said whatever might be the practice of that court, this court will not presume that a writ of error is brought for the purpose of delay; but, on the contrary, they have always required a declaration (b) of the party suing out the writ of error that such was his object before they have permitted the other party to proceed in defiance of the writ of error. This rule has been so strict that they would not attend to the tacit acquiescence of the defendant's attorney, who sued out the writ of error, and could not point out any defect in the proceedings (c). And indeed it would be nugatory to give a right to the subject to question the validity of a judgment upon a writ of error, if he could not in the mean time avert the operation of the judgment thus impeached.

LORD KENYON, Ch. J. In general the rule is as the plaintiff's counsel has stated it, that a writ of error allowed and served operates as a supersedeas to an execution, and the Court will stay the proceedings of course; but that is on the supposition that the party may have some error to complain of in the judgment, which it is right should be examined into before execution is awarded. And therefore if it appear plainly and unequivocally to the Court that the writ of error is brought merely for delay, that reason does not hold. Now nothing can make it appear more plainly than the mere state of the proceedings

(a) *H. Bl. Rep. C. B.* 432.

(b) *Pool v. Charnock*, ante 3 vol. 79.

(c) *Christie v. Richardson*, ante 3 vol. 78. But in *Law v. Smith*, *M.* 30 *Geo.* 3. *B. R.* Where it appeared that both before and after the writ of error was brought the defendant's attorney had told the plaintiff "that he must delay the payment of the debt and costs as long as he could, as his client was

"already considerably in arrear to him," the Court refused to stay the proceedings on the plaintiff's judgment pending the writ of error brought by the defendant.

The same point was ruled in *Evans v. Gilbert*, *Tr.* 31 *Geo.* 3. *B. R.* on a declaration by one of the bail that the writ of error was brought for delay.

in



in this case; and the case cited from the Common Pleas being directly in point, there seems no ground here for withholding from the defendants the fruits of their judgment.

BULLER J. The rule is that if it be apparent to the Court that the writ of error is brought merely for delay, they will not stay execution. How that is to be made out is matter of evidence in each case. In general the Court require it to be proved by an acknowledgment from the party who sues out the writ of error; and they have held that the *belief* of the *other* party that it is brought for delay is not sufficient. But here it is apparent that there can be no error of which the plaintiff can avail himself; for if the record were manifestly erroneous, the plaintiff, who has made default by suffering a nonsuit, can never have a judgment afterwards in his favor.

The other two judges concurring,

Rule discharged.

The Mayor and Commonalty of ORFORD *against*  
RICHARDSON and Another.

Friday,  
Nov. 18th.

TRESPASS for fishing in the plaintiffs' free fishery and also in their several fishery in *Orford Haven, Suffolk*. Plea, that *Orford Haven* from time immemorial hath been, and is, an arm of the sea, in which every subject of this realm hath had and still ought to have the liberty of free fishing. Replication, that the corporation of *Orford* are a corporation by prescription and also by charter granted by queen *Elizabeth*; and that the corporation have immemorially had and enjoyed, and still ought to have and enjoy, the exclusive liberty of dredging and fishing for oysters in the said place &c, at all seasonable times of the year, traversing that in the said arm of the sea every subject has a right of free fishing &c. Rejoinder, that the place in which &c, hath been immemorially an arm of the sea, in which every subject has a right of free fishing, traversing the prescriptive right claimed by the plaintiffs in the replication. Demurrer, because the plaintiffs in their replication traversed a material and issuable point of the defendants' plea, and by that traverse tendered to the defendants a material issue, but the defendants in their rejoinder did not take issue upon that traverse, or join in issue with the plaintiffs thereupon.

Totrespafs for fishing in the plaintiff's fishery, defendant pleaded that the place is an arm of the sea, in which every subject has a right to fish : the plaintiff in his replication claimed an exclusive right by prescription, traversing the general right; held that the defendant ought to take issue on the traverse, and ought not to traverse the prescriptive right claimed by the plaintiff; for the first traverse is a material

one, and will put in issue the true question in dispute between the parties.

one, and will put in issue the true question in dispute between the parties.  
See 5. Durnf. & East 367. a short mention  
of a reversal of this judgment in the  
exchequer chamber, & in 2. H. Blackst.  
182. an account of the reason of the rever-  
sal.



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but passed by and took no notice thereof, and traversed another part of the plaintiffs' replication, and thereby attempted to put in issue another matter, and a matter alleged by the plaintiffs by way of inducement only to the traverse so made and taken by the plaintiffs; and thus attempted to introduce great uncertainty, confusion, and unnecessary length of pleading &c.

*T. Walton* was to have argued in support of the demurrer: but the Court desired

*Baldwin, contra*, to begin; who endeavoured to support the rejoinder by saying that the traverse tendered in the replication was a matter of law, and that in such a case the defendant was at liberty to traverse the inducement to the plaintiff's traverse. It is not disputed but that, where a material traverse is tendered, which will put the whole question in issue, the adverse party must take issue on it: but here the plaintiffs wished to traverse a mere matter of law, because in an arm of the sea every subject has a right *prima facie* to fish. *Carter v. Murcote*, 4 Burr. 2162. *Warren v. Matthews*, Salk. 357. 1 Mod. 105. The defendants being subjects, have a *prima facie* right to fish, without going into evidence to establish that right, but the party disputing that title must shew a prescriptive right in himself. And therefore the defendants offered a traverse of the special right in the corporation; which was the material issue to be tried, namely, whether or not they had such a separate right as would take it out of the general rule of law. That there may be a traverse upon a traverse, when the first is not material, is clear from many authorities. In *Mall. Qu. Imp.* 229. it is said that if the traverse tendered be not material in substance, the other party may traverse the inducement to such traverse, and need not take issue on the former traverse. Again in *Hob.* 104. "A man brings an action of waste for felling trees, and lays that the lessee felled and sold them: the defendant confesses that he felled them, but saith that he bestowed them in repairing the house, *absque hoc* that he sold them: The plaintiff may reply that he let them rot, or any like case of waste, *absque hoc* that he employed them to reparations, and this is traverse upon traverse." So in *Crane v. The Bishop of Norwich* (a) in *quare impedit* the plaintiff declared on a seisin in *A.*, who conveyed to *B.*, who conveyed to the plaintiff, and that afterwards the church became void; the defendant pleaded that before the conveyance to the plaintiff the church became void, and *B.* presented him, traversing that the church was void at any time after the conveyance to the plaintiff. The plaintiff

(a) 2 Lutw. 1632.



replied that *A.* presented the defendant, traversing that *B.* presented him. That was a traverse of the inducement to the defendant's traverse, and held good.

LORD KENYON, Ch. J. It seems clear from the cases cited that, where a traverse is tendered, which is not calculated to try the right in question, the other party need not take issue upon it, since it would be a nugatory issue. But it is admitted that there cannot be a traverse upon a traverse, when the first will decide the whole question. And this does not depend on any arbitrary or capricious rule, but is founded on good sense and reason; otherwise pleading would answer no other purpose than that of lengthening the record. With regard to the question of law in this case, as to the right claimed by the plaintiffs, there can be no doubt but that there may be a prescriptive right in a subject to a several fishery in an arm of the sea. Here then after the defendants had pleaded that the place in question was an arm of the sea, in which every subject has a right of fishing, the plaintiffs replied a prescriptive right in themselves "without this, that in the said arm of the sea every subject has a right of free fishing &c." That was saying in other terms, "The right of fishing in this place does not stand on the general public right, but on special grounds derogatory from the general law." That traverse necessarily involved in it the real question in dispute between the parties, and consequently the defendants should have taken issue upon it.

ASHHURST, J. It is clearly established that, wherever the point in question is traversed by one party, the other must take issue upon it, for they are not to go on in *infinitum*. The use of pleading is to bring the matter in litigation to one point. And there cannot be any doubt here but that the merits of this case might have been fairly tried on the first traverse. But it has been objected that this was a traverse of the law: that argument would have been well founded if there could be no prescription against the general right: but, as it is clear that there may be a prescription to take away the general right of the Public in an arm of the sea, the traverse tendered by the plaintiffs would put in issue the real question between these parties; for it is founded on an antecedent fact introduced into the replication, which, if true, would defeat the general right upon which the defendants relied.

BULLER, J. The defendants' counsel has endeavoured to support the second traverse on two grounds; first, because the traverse

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traverse tendered by the plaintiffs is a matter of law; and secondly, because it is immaterial. The first is answered by saying that this is to be supported by evidence, and is not mere matter of law. And as to the other ground, the rule of pleading has been truly stated, that, if the first traverse tendered be immaterial, the adverse party may add another traverse. Then with regard to the materiality of the plaintiffs' traverse, the fair question might have been as well tried on the first, as on the second, traverse. For one party is to prove that this is an arm of the sea, in which *prima facie* every subject has a right to fish; the other is to establish a prescriptive right, which destroys the general right. And if the point in litigation come directly to be tried on either of these issues, it must be tried on that traverse which is first tendered. It is like the case of a traverse where the life or death of another person is to be put in issue: if the first traverse tendered be that the party is dead, issue must be taken on that; or *vice versa*; because either of these traverses will bring the same question to trial. The case cited from *Hobart* (a) is distinguishable from the present: There the defendant tendered an immaterial traverse; the *cutting down the trees* was the wrong, and it was immaterial to the merits of that case whether the tenant had or had not *sold them*.

GROSE, J. declared himself of the same opinion.

Judgment for the plaintiffs.

(a) This was not the principal case in *Hobart*, but is only cited from 5 *Ed.* 4. 100. B. And *Hobart*, Ch. J. in commenting upon it said "This first traverse was not material, nor to a point material, for the plaintiff might have declared of the felling only, and the other point was mere surplusage. And therefore though perhaps if

the plaintiff had joined issue upon it, and it had been found for him, he should have had judgment, yet clearly he was not bound to take issue on the plea, as not final to the action; and therefore the plaintiff might have demurred upon the defendant's plea, as resting upon a thing not material.

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The KING against E. EDWARDS.

A witness  
may be asked  
whether he  
has not been  
in the pillory  
for perjury.

ON an application to bail the prisoner, who was charged with grand larceny, one of the bail was asked, whether he had not stood in the pillory for perjury; this question was objected to as tending to criminate him, but

*See Mac-Wally's  
Rules of Evidence  
250.*

The Court over-ruled the objection; saying there was no impropriety in the question, as the answer could not subject him to any punishment: and the bail admitting the fact, he was of course rejected.



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BEACHCROFT and Others *against* BROOME.Friday,  
Nov. 18th.

**T**HIS was a case sent from the Court of Chancery for the opinion of this Court. *M. Wymondfold*, by will, dated 12th June 1748, devised his estates in *Berkshire* (except what were situate at *Coxhill* and *Lambourne*, and the tithes of *Grove*) to his son *Francis Wymondfold* and his heirs &c. and the rest of his estates (of which the premises in question art part) to his son *Charles* and his heirs &c.; and if either *Francis* or *Charles* should die without having settled, or otherwise disposed of, the estates so devised, or without leaving issue of his or their respective body or bodies lawfully begotten, or having such issue such issue should die before his or their age or ages of twenty-one, and without leaving lawful issue, he willed that the premises so given to such of his sons *Francis* and *Charles* so dying should go, and he gave the same, unto the survivor of them, his heirs &c, for ever; and if the survivor should die without having settled or otherwise disposed thereof, or of the estates thereby originally devised to him, or without leaving lawful issue of his body, or, having such issue, such issue should die under twenty-one without issue, and his son *William* (a) should then be dead without issue, then he gave such of the said devised premises as should not have been settled or disposed of as aforesaid, unto the right heirs of *M. Green*, then deceased, in fee. *Matthew Wymondfold* died soon afterwards, and *Francis Wymondfold* died in 1759 without issue. By indentures of lease and release dated 9th & 10th November 1759, and of bargain and sale inrolled, dated the 10th November 1759, and a recovery suffered thereon in *Michaelmas* Term 1759, *Charles Wymondfold* conveyed the premises in question to *J. Shephard Clerk* in fee. In August 1776 *Charles Wymondfold* died without issue, and in 1779 *William Wymondfold* also died without issue. *John Shephard*, who died in 1789, by will dated 17th December 1789, devised the premises in question to the plaintiffs (whom he also appointed executors) in trust to sell the same; and they on the 27th April 1790 sold the same by auction to the defendant, who has since refused to complete the purchase, contending that the title above stated is not a good title. The question sent for the opinion of this Court was, whether under the devise in the will of *Matthew Wymondfold* to *Charles Wymondfold*, and the deeds of lease and release, and bargain and sale dated in November 1759, and the

Under a devise to *A.* and his heirs, but if he die without settling or disposing of the same, or without issue, then over, *A.* may settle the estate in his life-time, and defeat the limitation over.

(a) This was another son.



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recovery suffered in pursuance thereof, *J. Shephard* the devisor took an absolute and indefeazible estate of inheritance in fee-simple in the premises in question.

*Russell*, for the plaintiff, said that it had been contended in the Court of Chancery that as the estate in question was given over if *Charles*, the son, died without having disposed of it, or without leaving issue, in the disjunctive, it was vested in *Green's* heir, because both those events had not happened; but he insisted that that question did not arise here, because the estate was first given to *Charles* in fee, and was only to be defeated by his not disposing of it and dying without issue, which necessarily implied the power of his disposing of it in his life-time: and, as he actually conveyed it in 1759, the devise over to *Green's* heir never took effect. But even if the former question could be gone into, the word "or" might be construed "and", in order to effectuate the devisor's intention. *Pollexf.* 645. 2 *Str.* 1175. 3 *Atk.* 390. and *Wright v. Kemp*, ante 3 vol. 470. And that such was his intention is manifest from the devise in question; for otherwise, if *Charles* had died leaving issue, but had not settled or disposed of the estate, it would have gone over to *Green's* heir, and the issue of *Charles* would not have taken.

*Chambre* was to have argued on the other side, but candidly confessed, in answer to a question from the bench, that he had no hopes of success.

LORD KENYON, Ch. J. It is impossible to raise any serious doubt in this case. I take it for granted that this case was sent from the Court of Chancery as a matter of course, on it's being suggested there that a question would arise on the will, fit to be determined in a court of law. It seemed to me as if the parties had considered that a question would be made whether this were or were not an estate-tail: if it had turned on that question, I should have thought it extremely clear that, on failure of the first limitation, the second might have taken effect as an executory devise. In truth the real question is what was the intention of the devisor: and if that can be collected from the words of the will, it must be carried into execution, provided it be not contrary to the rules of law. Now he has said in express terms "I give one estate to one son and his heirs, and another to another son and his heirs, and if either of them die, without having settled or disposed of the estates, or without issue, then that it should go over." But the son, *Charles*, has settled and disposed of the estate given to him; and there is no doubt but that the devisor intended that he should have the power so to do. And

*The Court* afterwards certified accordingly.



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BRADSHAW *against* LAWSON.Friday,  
Nov. 18th.

THIS was an action of debt to recover 2s. 6d., in which sum the defendant had been amerced for not attending, in respect of a customary estate, a court baron held for the manor of *Halton*, of which the plaintiff was lord. At the trial several objections were taken by the defendant's counsel, when it was agreed that a case should be reserved for this Court, and if they should be of opinion that either of the objections were well founded a *non-suit* should be entered. The special case, as far as respects the principal question, stated these facts; that the plaintiff is seised of the manor of *Halton* for life; that the defendant is seised of fourteen acres of land, parcel of the estate mentioned in the deeds after stated. Till the reign of queen *Elizabeth* all the lands within the manor (except the lord's demesnes) were of customary tenure of inheritance, passing by customary deeds and admission of the lord. Several of those estates remain customary, unaltered in point of tenure. The defendant's estate was until the 2d October 18 Jac. 1. parcel of one of those customary estates; when by an indenture of feoffment, with livery of seisin indorsed thereon, the then lord of the manor in consideration of 80*l.* granted, aliened, enfeoffed, and confirmed, it to *C. Barwicke* and his heirs and assigns in fee-farm, reserving the yearly rent of 24*l.* 11*d.* (there stated to be the ancient yearly rent) for all manner of other rents, suits, services, exactions, and demands, whatsoever. The case then set forth another deed of the 14th May, 1 Car. 1., by which, after reciting that upon the agreement of the above conveyance, and as part of the consideration given or reserved upon the sale of the estate, it was agreed between the parties that *Barwicke* and all other persons who should hold his estate should grind their corn at the lord's mill, and should do suit and service at the lord's court baron for the above estate, *E. Barwicke* (the son of the above *C. Barwicke*) covenanted for himself and his heirs that they would at all times be suitors and do suit and service, and appear in person at all the courts-baron &c. as formerly, and should be subject to pay such fines and amerciaments as should be assessed or found due by the homage or jury within the manor: and this deed also contained a covenant by *E. Barwicke* that if he and his heirs and assigns,

If the lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services; for the tenant by reason of the statute *Quia emptores* must then hold of the superior lord. To constitute a court baron it must be holden before two free suitors at least. *See sec. 3. Stat. 12 Edw. 1. c. 1.* *See also 445.*



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owners of this estate, should make default in doing such suit and service &c. they should pay 2s. 6d. for every such default. The case further stated that several other of the customary estates in the manor have been since enfranchised in like manner. The stile of the courts holden in the manor has always been thus, "The court-baron of *A. B.* esq. held there on &c, before &c." As well the customary tenants, as those who have been enfranchised, have been accustomed to attend at such courts, and the juries have been composed indifferently of such customary tenants and owners of such enfranchised estates, who have joined in making amerciaments upon all such owners, as well of customary as enfranchised estates, as have made default and neglected to appear after notice: but it does not appear by the rolls of the manor that such amerciaments have ever been affeered. The owners of the enfranchised estates making such defaults have been usually, but not always, amerced in the sum of 2s. 6d. each; and the owners of the customary estates 3s. 4d. The defendant, at the time of holding the court hereafter mentioned, was seised of 14 acres of land in *Neither Highfield*, parcel of the premises comprized in the deeds of 2d October, 18 James I., and 14 May, 1st Charles 1st. One *Thomas Fletcher* from whom the said 14 acres were purchased by defendant's ancestor, and who was the owner of the residue of the estates comprized and mentioned in the said deeds, pays the yearly rent of 1l. 4s. 11d. mentioned in the said deeds to the lord of the manor; and *Fletcher*, upon the conveyance of the 14 acres to the defendant's ancestor, reserved to him a less yearly rent in respect of the premises so conveyed. It then stated that a court was held within the manor in June 1788, (after giving the usual notice,) before the plaintiff, and his steward; at which the defendant was amerced 2s. 6d. by the jury for not appearing to perform suit and service: the amerciament was signed by the twelve jurymen, three of whom were owners of customary, and the others of the enfranchised, estates. The defendant never resided within the manor or the parish of *Halton*, but at three miles distance. Since the defendant's ancestor became possessed of this estate, which was in 1742, no owner has attended the Court, or been amerced for non-attendance, except in one instance, in the year 1786, when the defendant paid an amerciament of 2s. 6d. *Thomas Fletcher*, the owner of the residue of this estate, attended all the courts that have been held since the year 1742. Before the above enfranchisement the customary

tenants



tenants attended these courts; and since that time *Barwicke*, and all other owners prior to *Fletcher*, usually attended, or have been occasionally amerced for non-attendance.

*Fitzgerald* for the plaintiff, in answer to the first and general objection that the defendant was not bound to do suit and service to the Court, said, that though by the first deed, 2 *Jac.* 1. taken by itself, the defendant's estate might be said to have been enfranchised, yet, by the second, which is to be considered not only as part of the same transaction, but as a part of, and engrafted on, the first deed, suit and service were expressly reserved. Both these deeds ought to be considered as forming one conveyance; especially as the latter recites that it was part of the first agreement that the suit and service should be reserved. In *Co. Litt.* 222. *b.* it is said "if an agreement be made between two, that the one shall enfeoff the other upon condition in surety of the payment of certain money, and after the livery is made to him and his heirs generally, the estate is holden by some to be upon condition, inasmuch as the intent of the parties was not changed at any time, but continued at the time of the livery." But even upon the first deed alone, suit and service were reserved in law. By the reservation of the fee-farm rent the lord was entitled to fealty; and a feisin of fealty is a feisin of all other services. *Lit. sect.* 130, 131; 4 *Rep.* 8., in which case it was also held that "feisin of the rent" was "feisin of the fealty." As to the second objection that the Court was not properly holden, because not held before the free suitors, he admitted that the objection might have prevailed if this were a court baron, strictly so called, but he said that it appeared that this was a customary, and not a copyhold, court; and that there never was a sufficient number of free suitors within this manor to constitute a court baron. But in a customary estate, like the present, no free suitors are necessary; the Court may be held before the Lord himself. *Scroggs on Courts*, 53. And in *Co. Lit.* 58. *a.* it is said that the lord or his steward is the judge of such a court as this (*a*).

Lord KENYON, Ch. J. (stopping *Chambre, contra*) Notwithstanding all the industry that has been exerted on this occasion,

(*a*) Several other objections, that had been made at the trial, were answered in the argument; that the defendant did not live within the bounds of the manor; that he was not personally summoned to attend

the Court; and that the amercement was not affected: but these arguments are here omitted, because the Court confined their opinion in giving judgment to the principal question.

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BRADSHAW  
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I cannot entertain a doubt on the principal question, which was settled about five centuries ago by a positive act of parliament, the statute of *quia emptores* (a). And the objection to the plaintiff's claim, which arises on this statute, decides the merits of the cause, and renders it unnecessary to consider the other points that were made by the plaintiff's counsel, which perhaps on examination would be found equally destitute of all legal principles. It is stated, as the foundation of the plaintiff's demand, that the relation between these parties is that of lord and tenant; as long as that continued, the services to be rendered by the latter were to be regulated by the custom of the manor; and among others was that of attending the lord's court. Now it is stated in the case that the lord of this manor in the reign of *James* the First by competent deeds of conveyance conveyed the property, of which the defendant is now seised, to the defendant's ancestor, then a customary tenant of the manor. But it has been said that the old services were reserved by the reservation of the fee-farm rent: but if the relation of lord and tenant absolutely ceased to exist, that rent can no longer be considered as rent-service, but a rent to be recovered according to the contract between the parties. After the statute of *quia emptores* the lord could not by any deed reserve the old services, when he conveyed away the estate in respect of which those services were due; for the tenant must hold of the superior lord. By the conveyance the estate was no longer parcel of the manor, nor held of the manor; neither was the defendant's ancestor any longer a tenant of the manor. Therefore on that point, on which all the plaintiff's claim is founded, I am extremely clear that the defendant was not bound to attend the plaintiff's court baron as a tenant of the manor. As to the second question: this is not stated to be a prescriptive manor, to which there are certain prescriptive incidents, as was done in *Lord Paget's* case (b), but it is stated in every count in the declaration to be a common law court baron. And such a court can only be held before two free suitors at the least: whereas this court was holden before the lord and his steward. This point is so well settled, that cases need not be cited to prove it; and I will only mention one instance, of *Rumsey v. Walton*, which was an action on a judgment alleged to have been recovered in a court baron; on the trial at the *Hereford* Summer assizes 1760, before *Foster* J. the plaintiff proved the court to

(a) 18 Ed. 1. §. 1.

(b) Co. Entr. 118.



have been holden before the steward; on which it was objected that such a court could not be legally held without two free suitors; and the judge, being of that opinion, non-suited the plaintiff. Without however enlarging upon this, or going through the other, points that were argued, and which might perhaps be remedied by the plaintiff's framing a new declaration, I am of opinion that the very foundation of his claim totally fails; and that a judgment of non-suit should be entered.

ASHHURST, BULLER, and GROSE, Justices, assenting,  
Judgment of non-suit.

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BRADSHAW  
against  
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DUCK *against* ADDINGTON.

TO an action of trespass and false imprisonment the defendant, a justice of the peace, pleaded the general issue, and at the trial justified under a commitment; which, after stating that, on a charge made before the defendant that the plaintiff, the driver of a hackney coach, had refused to go with his coach from *Kensington* to *HammerSmith*, when lawfully required, the defendant had convicted him in the penalty of 30s., proceeded thus; "and whereas the said *G. Duck* has been demanded by me one of the said justices immediately to pay the said forfeiture, but hath refused and neglected so to do, him therefore safely keep in your said custody to hard labour for the space of one month from the date hereof; and in the mean time to receive the correction of the house;" directed "to the governor of the house of correction at *Clerkenwell*." And the only question at the trial was whether this commitment were warranted by the 10 *Geo. 3. c. 44*; if it were, it was admitted that the defendant was entitled to a verdict. By the 9 *Anne c. 23. s. 8*. a penalty of 40s. is inflicted on hackney coachmen for taking more than the hire, or refusing to go: by *sect. 12*. that penalty is to be recovered by distress, by warrant of three commissioners of hackney coaches, to be sold in ten days, if upon seven days notice the penalty be not paid without such warrant; and in default of distress, the offenders neglecting or refusing to pay are to be committed to prison by three commissioners till the penalty is paid: And by *sect. 49*, a penalty of 20s. is inflicted on any person, who drives a coach under license of another, for demanding more than his fare, or giving abusive language, to be recovered either before three commissioners, or one justice of the

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Under statute  
10 *Geo. 3. c.*  
44. *s. 7*. a  
justice of the  
peace after  
convicting a  
hackney  
coachman for  
refusing to  
go with his  
coach may  
immediately  
commit him  
to the house  
of correction,  
if he do not  
pay the pe-  
nalty.



1791.

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DUCK
against
ABDING-
TON.

the peace for *London, Westminster, Middlesex, or Surrey*; and if the party convicted refuse to pay, he is to be committed to prison to hard labour for seven days. By the 1 *Geo. 1. st. 2. c. 57. s. 2.* coachmen who refuse to go, or exact more than their hire, forfeit a sum not exceeding 3*l.* nor under 10*s.*; to be recovered levied, and applied, as is directed by the former act, concerning the 40 *s.* penalty. The 7 *Geo. 3. c. 44. s. 15.* enacts that when any person is convicted of any offence, mentioned in any law relating to the licensing and regulating of hackney coaches, three commissioners may either commit him to prison in like manner as by any former act they are authorized to do for any time not exceeding a month, or by warrant under their hands and seals may commit him to *Bridewell* in *London*, or to some other house of correction, there to be kept to hard labour for any time not exceeding one month, and also to receive the correction of the house, if the commissioners think fit. The 10 *Geo. 3. c. 44. s. 5.* after reciting the 7 *Geo. 3. c. 44.*, and that doubts had arisen whether the commissioners have a power under it to commit offenders to prison immediately upon conviction, "which power would be very beneficial in many instances to the Public," enacted that three commissioners may in all cases, where by law they may commit any offender to *Bridewell* or any house of correction, commit him *immediately &c.*; there to be kept to hard labour for any time not exceeding a month, and also to receive the correction of the house &c.: and *sect. 7.* enacts "that all the offences mentioned in that, and the recited, acts, may be heard and determined, and all and every "the forfeitures and "penalties thereby inflicted may be recovered and levied, not "only by three commissioners &c. but also *by any justice of the "peace* where such offence shall be committed, *by such ways and "means as the penalties and forfeitures in the said act, of the 9th of "Anne, are directed to be levied and recovered."* It was urged by the plaintiff's counsel at the trial that this last act did not give power to a magistrate to commit *immediately*, but only in default of distress, as the commissioners might have committed under the statute of *Anne*; but Lord *Kenyon* ruled otherwise, and the defendant obtained a verdict.

Wigley having obtained a rule to shew cause why the verdict should not be set aside, on the ground of a misconstruction of the act,

Mingay now shewed cause against it. The Legislature intended to give a co-extensive jurisdiction to the commissioners
I and

and to magistrates. It is admitted that the former have the power of committing to prison immediately, by the 10 Geo. 3. c. 44. § 5.; and the same power is given to justices by the 7th section, which does not say that the penalties and forfeitures may be recovered before the justices by such ways and means as the penalties and forfeitures in the act of the 9th of *Anne* are directed by that act to be levied, but by such ways as those forfeitures are directed to be levied and recovered; that is by such ways as they may be now recovered; and this very statute 10 Geo. 3. expressly gave the power of immediate commitment for such offences. This is not the first time that the powers vested in the commissioners have been extended to magistrates; for the 4 Geo. 3. c. 36. § 2., after reciting that inconveniences had arisen from the justices of *Kent* and *Surry* not having the same power to enforce the statutes relating to hackney coaches as the commissioners, the aldermen of *London*, and the justices for *Westminster*, gave the former the same authority within their respective jurisdictions as the latter had. And the circumstance of the magistrates of these four districts being omitted in the fifth section of the 10 Geo. 3. shews that the Legislature intended by the subsequent clause (sect. 7.) to give to all justices, universally, where the offence should be committed the same powers as the commissioners at present have over those offences, and not merely those powers which they had under the 9th of *Anne*.

Erskine, and *Wigley*, in support of the rule, after observing that this question arose on a statute highly penal, since the party convicted had no opportunity of appealing, or of seeking redress, until he had been imprisoned, and that the construction of it ought not to be extended beyond the words, admitted that justices have the power of commitment, but said that it was only in the same qualified manner that the commissioners had under the statute 9 *Ann.*, namely, after a warrant of distress, and no goods found to answer that distress. The stat. 10 Geo. 3. c. 44. after reciting the doubts on the 7 Geo. 3. gave to the commissioners a power of immediate commitment. But that was a new power, of which they were not possessed before: and it is silent as to magistrates, from which it is clear that the Legislature did not mean to confer the same power on them as on the commissioners. Then by a subsequent section all forfeitures and penalties may be recovered before the justices "by such ways and means as the penalties and forfeitures in the 9th of *Ann* are directed

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against
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to be levied and recovered:" it is not "by such ways and means as the penalties *of* the 9 *Ann* may be *now* levied and recovered," but "as the penalties *in* that act are directed to be levied; that is, "by such ways as the penalties are directed to be levied and recovered in that act." And those penalties and forfeitures can only be levied and recovered by distress, in default of which the offender may be committed, not immediately, but after seven days at the least. According to the defendant's construction of the 10 *Geo.* 3. c. 44. s. 7. not only one word is to be substituted for another "of" for "in," but another word "now" must also be added; neither of which is by any means necessary to give a certain effect to that clause; and in a penal statute it seems too much to suppose that a court of law will add a word for the purpose of conferring additional and great powers on a single magistrate, which are always liable to abuse, especially as the statute may be enforced by those powers which it has clearly and unequivocally given. It is only in cases where a penal statute may be otherwise rendered nugatory, or easily evaded, that a court of law can add a word, to prevent a failure of justice. Had the magistrates been totally omitted in this act, there might have been some colour of argument, that, as this act was in *pari materia* with the former ones, it gave the same power to the justices of the four districts as to the commissioners: but they are excluded by the former section, which shews that the power subsequently given to them was not to be the same as that given to the commissioners; otherwise they might all have been included in the same clause. Perhaps the Legislature were influenced by this consideration in making a distinction in the jurisdiction of the several classes of judges, that it might be imprudent to trust a single magistrate with the power of immediate commitment, though there might be no danger in delegating that authority to three commissioners. But even it be doubtful on the words of the act, the Court should put the most mild interpretation upon it; since, whatever construction it may receive, it is a penal statute.

The Court said that this was a question of some difficulty, owing to the obscure manner in which the different acts of parliament were penned: but they thought, on considering the four statutes together, as being made in *pari materia*, and forming one general system of law upon this subject, that the Legislature intended to give, and had given, by the seventh section of the 10 *Geo.* 3. c. 44. the same power to the justices of immediate commitment

that was conferred on the commissioners by the fifth clause of that act; and consequently that the rule for a new trial should be discharged.

Rule discharged.

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The KING *against* T. SAINSBURY Esq. and
Another.

Saturday,
Nov. 19th.

THE indictment stated that on the 4th *September* in the 27th year of the present reign at the borough of *Southwark* in the county of *Surry*, a general meeting of the justices &c. of the county of *Surry*, acting in and for the division of the town and borough of *Southwark*, was *duly held for the purpose of licensing persons* to keep common inns and alehouses within the said division, according to the form of the statute &c. That one *J. Hedger* then and there requested the said justices at such meeting to grant him a license &c, in the parish of *St. George* in the *Borough*; that the said justices did not then grant him the license, but postponed the further consideration of the question until the 11th of *September*, to which day they adjourned that meeting; that at the adjourned meeting the said justices finally refused to grant their license to *Hedger*; that the defendants, two justices of the peace for the town and borough of *Southwark*, well knowing the premises, and having notice of the said determination, and that the license had been refused &c, not having any regard for the laws of this realm, but intending to increase the number of common inns and alehouses in the said town and borough, in defiance of legal magistracy and good order and government, afterwards, on the 18th of *September* in the same year, with force and arms at *Southwark* aforesaid unlawfully and wrongfully met together as justices of the peace for the town and borough of *Southwark* for the purpose of granting licenses to persons living in the said town and borough &c, and then and there unlawfully and wrongfully granted their license to the said *J. Hedger* to keep a common alehouse in the same house for which he had so requested a license to be granted to him by the justices for the county of *Surry*, acting in this division &c; in breach and violation of the defendants' duty as justices; in contempt of the king, and his laws; against the form of the statute &c; and against the peace &c.

The defendants pleaded the general issue; and on the trial the jury found a special verdict, in substance as follows;

After

By charter the mayor and some of the aldermen of *London* have jurisdiction in *Southwark*—but as the charter contains no *non intrumittant* clause as to the justices of the county of *Surry*, the latter have a concurrent jurisdiction with the former. Where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant ale licenses, their jurisdiction attaches, so as to exclude the others appointing a subsequent meeting; but they may all meet together on the first day. But if, after such appointment, the other set of magistrates meet on a subsequent day and grant other licenses, their proceeding is illegal, and the subject of an indictment.

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The KING
against
T. SAINSBURY.

After stating that the corporation of *London* were a corporation by prescription, it set forth three several charters; 1 *Ed.* 3.; 23 *Hen.* 6.; and 4 *Edw.* 6. by which (*inter alia*) the mayor, recorder, and such of the aldermen of the city as have passed the chair, are appointed justices of the peace for the town and borough of *Southwark*: but neither of those charters contained a *non-intromittant* clause as to the justices for the county of *Surry*. That the mayor and aldermen of the city who have borne the office of mayor, and the recorder for the time being, have been used and accustomed to hold sessions of the peace within and for the town and borough of *Southwark* four times in every year; and for forty years and upwards have licensed persons to keep alehouses in the said town and borough; but they have not been accustomed to act as justices of the peace there in any other manner. That the town and borough of *Southwark* is within the county of *Surry*, and the justices appointed for the county have been accustomed to act in *Southwark*, and to license persons to keep alehouses therein. That the general quarter sessions have been usually holden once in every year within the borough, and the three other sessions in other different places in the county. The verdict then stated that *A. B. C. D. &c.* (the justices for the county mentioned in the indictment) were on the 4th and 11th of *September* 1787 justices of the county of *Surry*, and acting in and for that division in which *Southwark* lies. That certain justices of the county, acting in and for the division in which *Southwark* lies, on the 15th of *August* 1787 issued their warrant under their hands and seals, and thereby appointed a general meeting of the justices of the county, acting in and for the said division to be holden on the 4th *September* then next following, at a certain place therein mentioned, for the purpose of licensing persons to keep common inns and alehouses within the said division; and that in pursuance of such warrant the said general meeting in the said indictment mentioned was held on the said 4th of *September* by and before *A. B., C. D., &c.* That at that meeting *J. Hedger* applied to those justices for a license, who did not grant it, but postponed the further consideration of it till the 11th of *September*, to which day that meeting was adjourned. That at the adjourned meeting held *&c.* those justices refused to grant a license to *J. Hedger*. That on the 25th of *August* 1787 the defendants, then being the mayor, and alderman of the city of *London* who had passed the chair, issued their warrant for holding a general meeting of the justices

IN THE THIRTY-SECOND YEAR OF GEORGE III.

justices in and for the town and borough of *Southwark* on the 14th of *September* then next at a certain place within the borough for the purpose of granting licenses &c.; in pursuance of which a meeting was held by the defendants on that day, which was adjourned to the 18th of *September*, when they granted a license to *Hedger*. That at this adjourned meeting, and before the defendants licensed *Hedger*, they had notice of the general meeting held by the justices of the county, and of their having refused to grant a license to *Hedger*. But whether &c.

Shepherd, on the part of the prosecution, contended that under 26 *Geo. 3. c. 31. s. 4.* there could be but one legal meeting of the justices, unless by adjournment, in any particular division for the purpose of granting licenses; and therefore unless the defendants could establish an exclusive jurisdiction in the city of *London* to that purpose, and shew that the county magistrates had no right to convene any meeting at all, they must fail, in as much as the county magistrates had first given notice of the meeting to be held, and the subsequent meeting of the city magistrates was not an adjournment of the other. The statute in question enacts "that no license shall be granted " but on the 1st *September* yearly, or within twenty days after; " and that such license shall be made for one year only to com- " mence on the 29th of the said *September*; and that the day " and place for granting such licenses shall be appointed by two " or more of the justices acting for the division by a warrant " under their hands and seals, at least ten days before such " meeting, directed to the high constable of the said division, " requiring him to order his petty constables &c, to give notice " to the several inn-keepers and alehouse-keepers within their " respective constablewicks of the day and place of such meeting; " and all licenses granted at any other time or place shall be " null and void to all intents and purposes whatsoever." The Court have already decided in *The King v. Holland and Forster* (a), and *The King v. Filerwood* (b), that the subsequent granting of a license by magistrates, after the general meeting had refused one, was the subject matter of a criminal information: and therefore as the act is illegal, an indictment necessarily lies, though no corrupt motive be imputed in the present case. Now it cannot be disputed that the county magistrates had a right to convene the meeting for the purpose of granting licenses: Their commission extends over the whole county; and though the de-

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(a) *Ante*, 1 vol. 692.

(b) *Ibid.*

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defendants may also have jurisdiction over the borough of *Southwark* by charter, yet as their charter contains no *non-intromittant* clause, it is clear that the jurisdiction of the county justices is not excluded. *Blankley v. Winstanley* (a). The utmost therefore the defendants could claim was a concurrent jurisdiction with the county justices, which would have authorised them to attend the general meeting pursuant to the first notice, but will not warrant them in holding a separate meeting of their own, subsequent to the other. If it were otherwise, the different magistrates would be ever running a race against each other in the granting of licenses, from which great mischiefs would ensue to the Public. He also took another objection, that it did not appear that the defendants had ever *acted* before in the division in any other respect than that of granting licenses; and the statute requires an *acting* distinct from and independent of the act of granting licenses. But

The Court said there was no weight in that objection.

Garrow, on the part of the city of *London*, declined entering into the general question of jurisdiction, alleging as a reason some particular objections to the manner in which the special verdict had been drawn up out of Court, and relied on several formal objections. 1st. The indictment only alleges that a general meeting of the county justices acting in and for the division was *duly* held &c; whereas it ought to have charged *in what manner* the meeting was held, that the Court might judge whether it were *duly* holden. Nor is this general charge cured by the finding, which is also defective, for the special verdict only states that on the 4th *September* &c. the justices issued their warrant under their hands and seals, and thereby appointed a general meeting of the justices &c. to be holden on the 14th *September* &c; for the purpose of licensing &c; and it is not found, as the act directs, that that warrant was issued at least ten days before &c. to the high constable, requiring him to order his petty constables &c. to give notice to the several innkeepers; and this being a special verdict nothing can be supplied by intendment. And therefore even if the general allegation were sufficient in the indictment, yet the whole of the facts ought to have been found, which were necessary to warrant it. In *R. v. Croke* (b) where a power was given by act of parliament to the justices of *Surry* at their quarter sessions

(a) *Ante* 3 vol. 279.

(b) *Cowp.* 26.

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upon the application of the mayor aldermen and common council of *London* in common council assembled to issue a precept to the sheriff, to summon a jury to assess the value of such lands as the mayor, aldermen &c. should adjudge necessary to be purchased for the purposes of the act; and the act required that notice *in writing* should be previously given to the persons interested at least fourteen days before, and left at their dwelling houses or usual places of abode &c; and the Sessions had thereupon made an order for the valuation of an estate in which the defendant was interested, but had neglected to state specially that a notice had been given to him *in writing* &c. according to the requisites of the act, but merely alleged that upon proof of *due* notice &c.: this Court were clearly of opinion that this was bad, and quashed the order, saying that the notice ought to have been fully set out and precisely pursued, and that the defect was not cured by appearance. 2d. The indictment states that a meeting of the justices, acting *in and for the division of the town and borough of Southwark*, "was held &c: but that is not found by the verdict; which states that a meeting was held by the justices of the county of *Surry*, acting *in and for that division in which Southwark lies*." The jury therefore have not found that there is such a division as that of *the town and borough of Southwark*; and in point of fact *Southwark* is within the division of the Half Hundred of *East Brixton*. *Non constat* therefore upon this record but that the meeting held by the *Surry* justices for the division in which *Southwark* is locally situate was a meeting for the rest of the division excluding *Southwark*; and if so, the defendants were justified in holding their meeting in *Southwark*. 3d. The act done by the defendants, no corruption being imputed to them, is not indictable; in the cases cited corruption was the principal ground of the charge. And even, supposing the act done by them were void, that would not make it the subject matter of an indictment.

Lord KENYON Ch. J. Considering who are the litigating parties upon this record, it is impossible to suppose that the prosecution was instituted for any other purpose than that of settling the limits of this jurisdiction. And therefore, without giving any opinion upon the formal objections which have been raised, and which may be argued again if the parties desire it, we ought to take the first opportunity of settling the real question in the case, which is in whom is vested the jurisdiction of granting ale licenses, and of doing other magisterial acts within
this

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this district. And that point, though it is of great importance to the Public, is involved in no difficulty whatever. That the king may grant a commission of the peace for a county, and that the jurisdiction of such justices may pervade the whole county, cannot be doubted. Neither can it be disputed that he may grant commissions of the peace for any particular district in the county, and that that subdivision may have justices of its own, exclusive of the jurisdiction of the justices of the county at large: but the latter can only be effected by a *non-intromittant* clause, prohibiting the county justices from interfering in that district. This doctrine was fully recognised in *Talbot v. Hubble*, 2 Str. 1154.; from a manuscript note of which it appears that it was there taken as a *datum* that the justices of the county would be excluded, if there were a *non-intromittant* clause in the charter granted to the smaller district, but not otherwise. In one of the charters granted to the city of *London* there is an express power constituting the mayor and certain of the aldermen justices of the borough of *Southwark*; they are therefore charter justices of that district; and that jurisdiction has never (I believe) been doubted. But another question has arisen, and which is proper should be settled, whether it be legal (for whether it be decent or decorous no person can doubt) for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction. It is of infinite importance to the Public that the acts of magistrates should not only be substantially good, but also that they should be decorous. The facts in this case are shortly these; some of the justices for the county of *Surry*, having before them the statute of 26 Geo. 2., and knowing that the licenses ought to be granted on a certain day and time, appointed a day, the 4th of *September*, for licensing ale-houses in this division, on which day they accordingly held their meeting; and certain of the magistrates of the city of *London*, who in general are competent to this purpose, appointed another meeting on a subsequent day. But the jurisdiction of the justices who had appointed the first meeting had attached before this time; not indeed so as to exclude the city justices from acting at the first meeting for they might all have acted together; but it excluded the city justices of their jurisdiction to act on the subsequent day. On the general question therefore I am clearly of opinion that the *Surry* justices and the magistrates for the city have a co-ordinate jurisdiction within this district; and that

the meeting of the city justices in this case was illegal, the jurisdiction of the other magistrates having first attached. But, as to the questions of form, if the city of *London* are serious in relying on them, I shall require further time before I deliver my opinion upon them.

ASHHURST, J. There being no words of exclusion in the city charters, it follows as a consequence that the justices of the county have a concurrent jurisdiction in the borough of *Southwark*: If so, it also follows that the jurisdiction of holding the meeting directed by the 26 *Geo. 2.* attached in those magistrates who first gave notice of the meeting; and it was a breach of the law in the other magistrates to attempt to wrest this jurisdiction out of their hands; for what the law says shall not be done it becomes illegal to do, and is therefore the subject matter of an indictment, without the addition of any corrupt motives. And though the want of corruption may be an answer to an application for an information, which is made to the extraordinary jurisdiction of the Court, yet it is no answer to an indictment, where the judges are bound by the strict rule of law.

BULLER, J. Declared himself of the same opinion; and he, and Mr. Justice *Ashhurst*, seemed to incline against the formal objections.

GROSE J. declined giving any opinion, not being in court when the case was argued.

The Recorder of *London* then said that, as the Court had delivered their opinion upon the principal question, the city would not trouble them with any further argument upon the objections of form; on which

The Court gave

Judgment for the Crown.

The KING *against* HOLLAND.

AN information had been filed by the *Attorney-General* against the defendant for offences committed in *India*; the trial for which is particularly provided for by the 24 *Geo. 3. c. 25.* amended by 26 *Geo. 3. c. 57.* The defendant demurred to this information: And the *Attorney-General* obtained a rule to shew cause why the information should not be amended in certain particulars.

demurred, may be amended in *B. R.* upon the motion of the attorney-general.

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The KING
against
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An information filed by the attorney-general against an *East Indian* delinquent under the 24 & 26 *Geo. 3.* to which the defendant

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Erskine, Bower, and Anstruther, shewed cause against the rule; contending that the Attorney-General ought to be driven to file a new information; and that no power was given by the act to enable the court of King's Bench, after a demurrer, to amend the information. They relied chiefly on the 22d and 24th sections of the latter statute; By the 1st of which the defendant is precluded from taking any advantage of a defect in the proceedings in arrest of judgment; and the latter only provides for the case where his demurrer is *over-ruled* in the King's Bench. From thence they implied an intention in the Legislature that, inasmuch as they deprived the party of the common right of the subject to arrest an illegal judgment, which would be final on that information, if his demurrer, which they did allow to him, prevailed, it should be equally final on the same proceeding. And as the defendant may demur in this case, without confessing or avoiding the fact, the Legislature intended that such a question as the present should be discussed on the demurrer, and not on a motion. If this were not so, it was nugatory to allow the party the privilege of demurring; for if upon every demurrer the Attorney-General were to be at liberty to amend, the party would only be assisting him to draw a sufficient information against himself, or suffer himself at once to be tried on an insufficient one. And besides this is particularly hard against the bail, who are thereby made to become responsible for the defendant's appearance to a charge entirely different from that for which they originally engaged.

The Attorney-General, contra, was stopped by the Court.

Lord KENYON, Ch. J. If amendment after amendment were to be applied for to harass the defendant, perhaps the Court would refuse to lend their aid any longer: but this is an application in the ordinary course of justice. The act of parliament on which these proceedings are founded is indeed introductory of something novel in the progress of them; but, as far as this information has already proceeded, there is nothing to distinguish it from other informations. At present the information has gone on in the common course; and therefore we may fairly try the propriety of this application by the common rules of practice on the like proceedings. Now amendments upon informations are so much a matter of course that they are even made on an application to the judges at chambers. With respect to the amendments proposed altering the nature of the undertaking of the bail; the

the same objection would equally apply to amendments in all other informations. But it is said that they ought not to be allowed here, because the Legislature, having precluded the defendant from moving in arrest of judgment for any defect in the proceedings, and having only provided for the case of his demurrer being over-ruled, could not have intended that his demurrer should be inconclusive, if it prevailed. We cannot here examine the hardship of such a provision: but let it always be remembered that the defendant has also an extraordinary indulgence granted to him; for he is not concluded by a bad demurrer, but may afterwards be tried on the merits. But at all events it is right that the nature of the offence should be made to appear clearly and legally upon the record to the judges who are to try it; and I am clearly of opinion that this amendment is absolutely of course.

Per Curiam.

Rule absolute (a).

(a) The 23d sect. of the 26 Geo. 3. provides expressly "that nothing in that or the recited act contained shall extend or be construed to extend to deprive the prosecutor of such information or the defendant thereto of any right, liberty, benefit, or advantage, to which by the law of the land or the rules of practice of the Court of King's Bench such prosecutor or defendant is or might have been en-

"titled upon any other information of a like nature depending in the said court of King's Bench before issue in fact joined therein; nor to prevent or restrict the said court of King's Bench from exercising any such power or authority as would or might have been legally exercised by it in the matter of any such information before issue in fact joined therein &c."

EVANS *qui tam* against STEVENS.

THIS was a *qui tam* action brought by the plaintiff, who sued as well for the treasurer of the *Eastern division* of the county of *Sussex* as for himself, to recover a penalty against the defendant under the 22 Geo. 3. c. 41. for having voted for members to serve in parliament for the town and port of *Seaford* at the last general election, being disqualified as an excise officer. At the trial before *Wilson, J.* at the last assizes for *Sussex* two objections were made. 1st. That the defendant did not come under the description of an excise-officer intended to be disqualified by the act in question, inasmuch as his appointment was only temporary; and for other causes, which it is not material

which the magistrates act under one general commission, but for the convenience of the county adjourn the quarter sessions from one part of it to another, and appoint a separate treasurer for each.

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against
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Where the moiety of a penalty is given by a statute to the treasurer of a county, riding, or division, the word *division* must be taken in its legal and not in its popular sense; and cannot be applied to the different parts of a county in

to

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to enlarge upon, as the Court thought it unnecessary to enter upon them, and desired the counsel to confine their argument to the, second objection; that this action ought to have been brought in the name of the treasurer of the county at large, and not the treasurer of the *Eastern division* in particular; no such division of this county being known to the law. As to this point it appeared in evidence that there always had been two persons appointed to the office of treasurer of the county, one specifically for the Eastern, (within which *Seaford* was locally situated), and the other for the Western, division, by separate appointments. But there was but one commission of the peace for the county; though the magistrates who lived in one of the divisions first held the quarter sessions in that division, and then adjourned it to the other division, where another set of magistrates and a different grand and petit jury attended in the same manner, and the several treasurers received their respective appointments from these different sets of magistrates. The learned judge upon the evidence directed a verdict for the plaintiff: but gave the defendant leave to move this court to enter a nonsuit, if they should be of a different opinion. A rule *nisi* having been obtained for that purpose,

Bond, Serj. *Palmer*, and *Wood*, now shewed cause; contending that by the words of the act, directing a moiety of the penalty "to be paid into the hands of the treasurer of the county, riding, or *division*, within which the offence shall have been committed," the term "*division*" was intended to be used in its *popular* and not in its *legal* sense; and referred to every county, where a distinct treasurer was *in fact* appointed for the separate divisions thereof. Here evidence was given not only that the county of *Sussex* was so divided at the time of passing the act, but that such division had been well known and recognized as far back as any evidence reached. The county of *Kent* is divided in a similar manner, and it is notorious that it is so divided. There is no reason for supposing that the Legislature did not mean to apply the word "*division*" as well to these two counties as to the county of *Lincoln*. And indeed there is an instance of the divisions of *Kent* having been recognized by the Legislature in an act of the 9 Geo. 2. c. 12. entitled "an act to enable the justices of the peace acting for the Western *division* of the county of *Kent* to purchase a convenient piece of ground for building a gaol for the said county, and for empowering the said justices to apply part of the county stock of the said *division* towards

towards the same." There is another general act, in which the Legislature have used the term *division* in the same popular sense, and which seems particularly to refer to such a case as this, where separate treasurers are appointed for the separate divisions; and that is the 12 Geo. 2. c. 29. an act for the more easy assessing collecting and levying of county rates. The first section directs the money assessed to be collected by the high constable of the respective hundreds and *divisions*; by the second section the overseers of the poor are directed to pay out of the money raised for the poor so much to the high constables of the respective hundreds or *divisions of the said counties*; and by the sixth section the high constables are directed to pay the money over to the person or persons " (being resident in any such county, riding, *division*, city, liberty, or place where such rates shall be respectively made) whom the said justices shall at their respective quarter sessions appoint to be treasurer or *treasurers*" &c. Now as under that act the money could only be paid into the hands of the treasurer of the particular division for which he was appointed, so, by a parity of reasoning, the Legislature must have intended the moiety of the penalty in question to go to the treasurer of that particular division, for which he was appointed, within which the offence was committed, and who would have been alone entitled to receive the penalty. And the person who was entitled to receive it is the person who should sue for it. The declaration could not be drawn in any other way than it is, so as to be adapted to the truth of the case; for, if the plaintiff had declared for the joint treasurer of the county as well as for himself, the answer would be, there is no such officer; and upon production of the separate and distinct appointments to each of the two treasurers, the plaintiff must have been nonsuited. So also if he had sued in the name of the treasurer of the county; there never having been such an officer appointed. The former case of *Evans qui tam v. Stevens* (a) only decided that the treasurer of a particular district, like *Seaford*, was not such a treasurer as was intended by the act, but did not decide that a treasurer could not be appointed for a division of a county which has always existed in fact. If indeed there had been a joint appointment for the whole to two, and merely for their own convenience they had separated their divisions, this declaration would be bad; but the fact is otherwise.

Piggott and Adam, contra, were stopped by the Court.

(a) *Ante* 224.

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Lord KENYON, Ch. J. We are called upon to review a very late decision upon the same subject, and between the same parties; and if it were wrong, to be sure we ought to take this opportunity of correcting it: but I confess, that, on re-considering the question, I am very well satisfied with that determination. The argument from the act of parliament, respecting the county of *Kent*, only proves that, where the Legislature chose to use a word according to its popular sense in a particular county, they said that it should have that effect: but where legal words are used, having legal ideas annexed to them, and there is nothing either in the reason of the thing, or in the context of the statute, to shew that the Legislature used them in a different sense, they must receive a legal construction. The act of parliament (a), on which this action is brought, directs that a moiety of the penalty shall be paid into the hands of the treasurer of the *county, riding, or division*, where the offence is committed. And the question is whether the last of these words, thus arranged together, shall apply to a division not known in the law, but capriciously adopted in particular counties. There are legal divisions, which satisfy, and directly apply to, each of these words: *county* applies to every county in the kingdom, except two; *Riding* to *Yorkshire*; and *Division* to *Lincolnshire*, where there are three divisions, and three separate commissions of the peace, three quarter sessions, and three distinct rates. The statute 43 *Eliz. c. 2. s. 14.* enables the justices at their sessions to appoint one or two treasurers within their respective jurisdictions; but, if for better collecting the rates they appoint two, still they make but one officer for the whole district, and not one for a moiety of such district. So in the case (b) respecting the subdivision of a parish where particular overseers act for their own convenience in particular districts in the parish, they are overseers for the whole parish, and the money collected by each constitutes one joint fund for the whole. The supposed difficulty therefore in this case that no action could be brought by the treasurer of the county, (though, if such difficulty did arise from the improper appointment of the justices, we perhaps could not remedy it) is removed. But it is said that the same person, who is appointed to receive the county rates in this particular district is to receive the moiety of this penalty: when the rates are collected by the treasurers for the Eastern and Western divisions of this county, they make one aggregate fund for the

(a) 22 *Geo. 3. c. 41. s. 1.*(b) *R. v. Newell, ante 266.*

whole county; and these two persons, though appointed treasurers for different districts, make in law but one treasurer for the whole county.

ASHHURST, BULLER, and GROSE, Justices, concurred; and BULLER, J. added that the argument, that the person, who is to receive ought to sue, is not well founded; for both ought to sue, though one may receive: perhaps a receipt by either would be sufficient.

Rule absolute.

HOPKINS *against* WALLER.

Saturday,
Nov. 19th.

THIS was a question on the annuity act (a). The annuity was granted in 1777, and the judgment was entered up before the annuity act was passed, but not till after the first day of the sessions. There was a memorial of the bond and judgment, but not of the warrant of attorney; for which defect a rule was obtained, calling on the plaintiff to shew cause why the judgment should not be set aside; against which

J. Heywood now shewed cause, on an affidavit stating that the plaintiff never had the warrant of attorney in his possession; and that it was originally delivered to the defendant's attorney who had since absconded. He also contended that a warrant of attorney to enter up a judgment was not an instrument to be inserted in the memorial, within the meaning of the act; for that the judgment was the operating instrument, the warrant of attorney being merely the authority for entering up the judgment; after which it was *functus officio*. That the act required the several deeds, by which an annuity is granted, to be enrolled for the purpose of conveying information to the Public of the real transaction between the parties: but that a warrant of attorney, from the very nature of it, could convey no information whatever. He also observed that this annuity was granted before the act passed.

Russell, in support of the rule, said that the words of the act were general, requiring *all* deeds, instruments &c, by which any annuity is granted, to be inserted in the memorial; and that there was no reason to except so important an instrument as the warrant of attorney, which was the foundation of the judgment. That this transaction must be considered as sub-

A memorial of a warrant of attorney given to confess a judgment, in order to secure an annuity, must be registered under the annuity act 17 Geo. 3. c. 26.

(a) 17 Geo. 3. c. 26.

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sequent to the passing of the annuity act, which had relation to the first day of the sessions. And, in answer to the fact now sworn to that the defendant's attorney had the warrant of attorney, that the plaintiff himself should have taken care to insert the warrant of attorney in the memorial, for his own security; and, not having so done, that he ought to suffer for his own neglect.

LORD KENYON, Ch. J. If it had appeared that the warrant of attorney had been lost before the enregistering of the memorial, it might have varied the case: but here that is not shewn, and therefore it ought to have been registered. For the meaning of the Legislature was that every instrument, by which an annuity is secured, should be inserted in the memorial. The words of the act are "deed, bond, instrument, or other assurance;" and it is impossible to say that a warrant of attorney does not fall within one of these.

BULLER, J. The warrant of attorney must have existed at first, and then it was incumbent on the plaintiff to inroll it: it's being lost since that time is no answer to this act of parliament.

Per Curiam.

Rule absolute.

Monday.
Nov. 21st.JONES on the Demise of GRIFFITHS against
MARSH.

Where the tenant of an estate holden by the year has a dwelling house at another place, the delivery of a notice to quit to his servant at the dwelling house is strong presumptive evidence that the master received the notice.

ON the trial of this ejectment before HEATH, J., at the last *Shrewsbury* assizes, it was admitted that the defendant was tenant from year to year to the lessor of the plaintiff, and the only question was whether the defendant had been served with due notice to quit. It appeared that the notice had been served on the defendants' maid servant at his house, which was not situated upon the demised premises, and the contents explained to her at the time: but there was no evidence that it ever came to the defendant's hands, except as above. As this notice was to determine an interest in lands, it was objected that it was not sufficient; and the learned judge non-suited the plaintiff, giving him leave to move to set aside the non-suit, and to enter a verdict for him, if this Court should be of opinion that the notice was sufficient.

A rule *nisi* having been obtained for that purpose by Bower,

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JONES dem.
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Plumer shewed cause, contending that as the plaintiff was not entitled to turn the tenant out of possession without giving him six months previous notice, the *onus probandi* necessarily lay upon the former; and that it was not reasonable to call upon the tenant to prove a negative, merely upon evidence that some other person had been served with it at his house; especially as in this case the service was at a house off the premises. This is analogous to service of a declaration in ejectment, which must be either on the tenant himself, or on the wife or servant on the premises; but even the latter is not sufficient, unless there be also an acknowledgment by the tenant that he has received it. *Bull. N. P.* 95. Perhaps if it had been proved that the tenant had kept out of the way to avoid being served, the jury might have implied notice from the service in question: but that was not the fact. The landlord might have subpœnaed the servant, who would have been able to have sworn positively to the notice to the defendant, if it had really been given; and therefore the difficulty arises from his own neglect.

Bower, contra, was stopped by the Court.

LORD KENYON, Ch. J. This is different from the cases of personal process: but even in the case alluded to of service on the wife, I do not know that it is confined to a service on her on the premises; I believe that if it be served on her in the house, it is sufficient. But in every case of the service of a notice, leaving it at the dwelling house of the party has always been deemed sufficient. So wherever the Legislature has enacted that, before a party shall be affected by any act, notice shall be given to him, leaving that notice at his house is sufficient. So also in the case of an attorney's bill, or notice of a declaration being filed. And indeed in some instances of process, leaving it at the house is sufficient; as a *subpœna* out of the Court of Chancery, or a *quo minus* out of the Exchequer. In general, the difference is between process to bring the party into contempt, and a notice of this kind; the former of which only need be personally served on him.

BULLER, J. *Ex concessis* personal service is not necessary in all cases. Then what were the facts of this case; it was proved that this notice was delivered to the tenant's servant at the dwelling house of the tenant, and its contents were explained at the time; and that servant, who was in the power of the defendant, was not called to prove that she did not communi-

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cate the notice to her master; this was ample evidence on which the jury would have presumed that the notice reached the tenant.

Rule absolute.

Monday,
Nov. 21st.

CLUGAS against PENALUNA.

An inhabitant of *Guernsey* can not recover in the courts of this country the price of goods sold by him there, if he knew it to be the buyer's intention to smuggle the goods into *England*, and gave him assistance for that purpose.

A Rule *nisi* having been granted for setting aside a non-suit in this case,

BULLER, J., before whom the cause was tried at the last *Cornwall* assizes, reported, that it was an action upon several bills of exchange, which had been given for goods bought by the defendant in *Guernsey*. The defendant rested his defence on the ground of it's being a smuggling transaction; in proof of which he read in evidence several letters, dated *Guernsey*, from the plaintiff, in which he informed the defendant of his having shipped so many ankers (a) of brandy and gin, which he had delivered to captain *Jobns* according to his orders, and that others were to be sent by the next *trip*. From the prices in the invoices accompanying the letters it appeared that the ankers in which the spirits were shipped contained about seven gallons each, and those prices tallied exactly with the sums for which the bills in question were given. Upon this evidence *Buller*, J. informed the plaintiff's counsel that he should leave it to the jury to find for the defendant, conceiving that this case fell within the principle of that of *Biggs v. Lawrence* (b), on which they agreed to be non-suited, reserving the question for the opinion of this Court whether the plaintiff was precluded from recovering under these circumstances.

Lawrence, Serjt. and *Jekyll* for the plaintiff, argued first, that here was no evidence of it's being a smuggling transaction. The mention of the word *trip* does not necessarily allude to smuggling. In the case of *Biggs v. Lawrence* there were other more suspicious circumstances, such as the spirits being in half ankers *ready slung*. But secondly, this is distinguishable from the case of *Biggs v. Lawrence*; because here the seller resided in *Guernsey*, and had no concern whatever with the act of smuggling; for the delivery to the defendant's agent was complete at *Guernsey*. But in the former case one of the parties making the

(a) An anker contains 64 wine quarts: but the 19 Geo. 3. c. 69. s. 1. prohibits the importation of foreign spirits in vessels con-

taining less than 60 gallons.
(b) *Ante* 3 vol. 454.

contract

contract resided in *England*, upon which the Court laid great stress; and the sellers were concerned in the very act of smuggling, having delivered the half ankers ready flung for that purpose. In the case of *Holman v. Johnson* (a), it was expressly held that the mere sale of prohibited goods abroad to a subject of this country did not contaminate the contract, though the seller knew that they were to be smuggled into this kingdom. Such is the present case. The people of *Guernsey* are no more bound by the laws of this country than those of *France*, unless specially named. The contract of sale and delivery was as entirely in *Guernsey* here, as at *Dunkirk* in that case. And the seller had no more to do with the act of smuggling in the one case than in the other. There was nothing either against morality or against any positive law, as far as the plaintiff was concerned. Neither was there any illegal act even by the defendant, till he brought the spirits in the prohibited quantities within four leagues of the coast of *England*. And therefore as the plaintiff was to reap no advantage whatever from the smuggling, nor had any concern with it, nor afforded any assistance to those who had, he ought not to be burthened with the consequences of it. The illegality was all on the part of the defendant.

Gibbs, contra, was stopped by the Court.

LORD KENYON, Ch. J. The only question is whether there was sufficient evidence to go to the jury of this being a smuggling transaction. It was said, in argument, that this was not an immoral transaction: but, though the mere selling of the liquors might not be so, yet if they were sold there by a subject of this country with a view to evade the laws of this country, it favours strongly of immorality. Now it is impossible, considering the whole of this case, not to see that such were the views of the plaintiff; and if so, it taints the whole transaction; and he cannot recover on the bills, which were given for securing the price of these goods: for though perhaps it might not be against the laws of *Guernsey*, payment cannot be enforced by judicial process in any court in this country.

ASHHURST, J. Though perhaps this was a legal contract at *Guernsey*, which may be enforced in the courts of law there, the question here is whether the courts of justice in this country ought to give effect to a smuggling transaction contrary to the laws of the country; I think they ought not.

(a) *Conv.* 341.

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CLUGAS
against
PENALUNA.

1791.

CLUGAS
against
PENALUMA.

BULLER, J. If goods be *bonâ fide* sold in *Guernsey*, and delivered there in the fair course of trade, the seller may recover the price of them here, though they be afterwards smuggled into this country. But here the plaintiff himself was assisting in the act of smuggling by the means of packing the goods; for the spirits were delivered in ankers, which are used for the purpose of smuggling; and if he take part in the transaction, it taints the whole of it. And this distinguishes the case of *Holman v. Johnson* from the present.

GROSE, J. If a *Guernsey*-man collude with a person living here to defeat the laws of this country, he shall not call in aid the laws of this country.

Lord KENYON also observed that this was distinguishable from *Holman v. Johnson* in another respect; that the plaintiff there was not a subject of this country, but here he is.

Rule discharged.

WILKINSON *against* PAYNE.

Monday,
Nov. 21st.

Where the jury have found a verdict for the plaintiff upon a presumption contrary to evidence, the court will not grant a new trial if the plaintiff be intitled to recover in conscience and equity.

THIS was an action on a promissory note for 180*l.* given to the plaintiff by the defendant in consideration of the plaintiff's marrying his daughter. The defence set up was, that, though there was a marriage in fact, it was not a legal one, because the parties were married by license when the plaintiff was under age, and there was no consent by his parents or guardian. In fact both his parents were dead when the marriage was celebrated, and there was no legal guardian; but the plaintiff's mother, who survived the father, on her death bed desired a friend to become guardian to her son, with whose approbation the marriage was had. It also appeared that, when the plaintiff came of age, his wife was lying in *extremis* on her death-bed, and died in three weeks afterwards: But in her life-time she and the plaintiff were always treated by the defendant and all his family as man and wife. Upon these facts *Grose, J.* before whom this action was tried, left it to the jury to presume a subsequent legal marriage, which they did accordingly, and found a verdict for the plaintiff.

A rule having been obtained on a former day, calling on the plaintiff to shew cause why the verdict should not be set aside,

Cockell, Serjt. and *Chambre* were now desired to begin in support of their rule; who admitted that, if no evidence whatever of the illegal marriage had been given, the presumption of a legal

legal one might have arisen, but contended that in this case all presumption of a legal marriage was rebutted by the fact proved that this marriage was illegal. It is a strong circumstance in this case that there could be no marriage after the plaintiff was of age, since the supposed wife was then on her death bed, from which she never afterwards recovered: and if there were a marriage by banns before, it might easily have been proved by the plaintiff, on whom the *onus* lay. If the presumption in this case can be supported, the marriage act will be totally repealed; and none of the settlement cases, which have arisen on this head, would have existed, if, in cases where an illegal marriage was proved and relied on, a subsequent legal one could have been presumed.

Law, contra, was stopped by the Court.

Lord KENYON, Ch. J. In the case of new trials, it is a general rule that in a hard action (a), where there is something on which the jury have raised a presumption agreeably to the justice of the case, the Court will not interfere by granting a new trial, where the objection does not lie in point of law. This rule is carried so far that I remember an instance of it, bordering on the ridiculous, where in an action on the game laws it was suggested that the gun, with which the defendant fired, was not charged with shot, but that the bird might have died in consequence of the fright; and the jury having given a verdict for the defendant, the court refused to grant a new trial. In this case though the first marriage was defective, a subsequent one might have taken place: the parties cohabited together for a length of time, and were treated by the defendant himself as man and wife; these circumstances therefore afforded a ground on which the jury presumed a subsequent marriage. And if there were any ground of presumption, it is sufficient in a case like this. In this case the parties did not intend to elude the marriage act; but all their friends were fully informed of and concurred in the former marriage. And I think we should ill exercise the discretion vested in the court, if, after the jury had presumed a subsequent legal marriage under all the circumstances of this case, we were to set aside their verdict. In a late case of *Standen v. Standen* (b), the jury presumed a legal marriage, though there was strong evidence to induce a suspicion that there had not been time enough for the banns to have been published three times.

(a) *Salk.* 644. 648.

(b) *Sittings at Westminster after Easter, 1789.*

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BULLER, J. If the verdict be consistent with the justice, conscience, and equity of the case, we ought not to grant a new trial. This is not so strong a case as that of *Deerley v. the Dutchess of Mazarine* (a), where the Court refused to grant a new trial though the verdict was against law. But in this case I doubt whether it was necessary to prove a legal marriage: considering the situation in which all these parties stood, I think that a marriage in fact was sufficient. In the case of settlements, alluded to in the argument, no derivative title can be set up unless a legal marriage be established.

Rule discharged (b).

(a) *Salk.* 116. 646.(b) Vide *Edmonson v. Macbell*, a. 2. vol. 4.

BISHOP against HAYWARD.

Monday,
Nov. 21st.

A. having declared on a promissory note against B. made by C. to A., by him indorsed to B., and by him again indorsed to A. and having obtained a verdict, the judgment was arrested.

THE plaintiff declared on a promissory note made by one *Collins*, payable to the plaintiff or order, and afterwards indorsed by him to the defendant, who afterwards re-indorsed it to the plaintiff again. After verdict for the plaintiff on the general issue, a motion was made by

Bower, in arrest of judgment, upon the ground that nothing appeared to be due to the plaintiff on his own shewing; for the defendant would be entitled to recover back again the identical sum from the plaintiff for which he had now obtained a verdict against the defendant; and therefore as this would introduce a circuitry of action, which the law does not permit, the declaration was bad upon the face of it.

Plumer, Lane, and Dauncey, shewed cause; contending that there was no instance of a judgment being arrested, because *prima facie* there might be a circuitry of action. But the plaintiff is intitled to maintain his verdict, if nothing appear which is necessarily inconsistent with his demand. And therefore if any case can be stated where upon this record the plaintiff, according to justice and law, would not be bound to refund the money again, the Court will presume after verdict that such a case was made out in evidence. Now suppose it had happened that the plaintiff had refused to receive this note from *Collins* as a satisfaction for his debt unless *Hayward* put his name upon it, to which *Hayward* had agreed, and had delivered it again to the plaintiff, his name as payee having been first indorsed upon it by way of form; in this case no doubt *Bishop* would be entitled

to maintain his action as subsequent indorsee against *Hayward*, and yet *Hayward* could not have recovered the money again of him as prior indorser, on account of the agreement between them. That was this very case. The objection of circuitry only holds where there is necessarily an equality of action. *Moor*, 23. But it does not necessarily follow that the plaintiff's recovering here will introduce a circuitry of action. There is nothing contrary to the law of merchants in a person's being the indorsee of a note, which he had before indorsed. The indorsement is only *prima facie* evidence of consideration. It may be rebutted; and it might have been proved that the first indorsement to *Hayward* was without consideration, and the second for a good one. And this must have been proved, otherwise the plaintiff could not have recovered a verdict; and, if the defendant had had a counter-demand upon the plaintiff, he should have pleaded a set-off: but it is not usual to state in the declaration whether the indorsement were with or without consideration. This is a motion in arrest of judgment; and after verdict it must be taken that every thing was proved necessary to enable the plaintiff to recover. 2 *Burr.* 899. The effect of this verdict is not only that the plaintiff had a right under the circumstances to recover against the defendant, but also that the defendant could not recover the same sum back again from him upon the note.

Lord KENYON, Ch. J. It is an invariable rule that every plaintiff must, on his own stating of the case, shew sufficient to entitle him to recover judgment against the defendant. And it is a rule equally clear that every instrument ought to be declared on according to its legal import. I do not say but that there may be circumstances, which, if disclosed on the record, might entitle the plaintiff to recover against the defendant on this note: but we are now called upon to form a judgment on the title which he has disclosed. And on the face of the declaration he has stated the note, as a legal existing note, and the indorsements as legal existing indorsements; we are therefore bound to consider them to be so. Then the case stands thus; that he, the plaintiff, being the original indorser of the note, calls on the defendant who appears on the record to be a subsequent indorsee. And nothing can be clearer in law than that an indorsee may resort to either of the preceding indorsers for payment: Whereas the present action is an attempt to reverse this. I admit that a case might happen in which the plaintiff might have stated that he was substantially entitled to recover on this note, *e. g.* that his own

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name was originally used for form only, and that it was understood by all the parties to the instrument that the note though nominally made payable to the plaintiff, was substantially to be paid to the defendant: but if such were the case, the note should have been declared on according to its legal import; as was held in *Minet v. Gibson* (a). A name may be omitted in the declaration, if the legal operation of the instrument requires it. But in this case the plaintiff has stated facts subversive of his title.

BULLER, J. The consequence of supporting this judgment would be that the plaintiff, without having any real demand on the defendant, may recover against him by the judgment of the court, without allowing to the defendant a possibility of defending himself. For on the trial it was only necessary for him to prove that the note in question was given, as stated in the declaration, payable to the plaintiff, that it was indorsed by him to the defendant, and by him re-indorsed to the plaintiff; the defendant cannot deny these facts; on proving which the judge at *nisi prius* was bound to say that he was entitled to recover, because he had proved the whole of his declaration. Then, having obtained a verdict, he comes to this court, and relies on that verdict as conclusive that he has a cause of action, on the ground that this Court must presume after verdict that, if the case supposed by the plaintiff had not been proved, he could not have recovered at *nisi prius*. But on a motion in arrest of judgment we are bound to look at the title which the plaintiff himself has stated, beyond which no presumption can be admitted. The cases of presumption alluded to are where the plaintiff has stated a case defective in form, not where he has shewn a title defective in itself (b). The case commonly put of a presumption after verdict is where a feoffment is pleaded without livery; there a livery is implied as making a part of the feoffment. But if the title be defective on the face of it, the Court cannot sustain the judgment. There is no foundation for the argument relative to the set-off; for the statutes only enable a defendant to set off one debt against another.

Per Curiam

Judgment arrested.

(a) Ante 3 vol. 481. and *H. Bl. Rep.* 569. | (b) Vide *Bull. N. P.* 320. *Rep. Temp. Hardw.* 118. 3

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STAINTON *against* BEADLE.Tuesday,
Nov. 22d.

A Rule having been obtained to shew cause why the inquisition should not be set aside, on the ground that the writ of inquiry had been executed at the time of the assizes before jurymen some of whom were debtors (a) taken out of prison for the purpose,

Erskine now opposed it; saying that, however improper such a practice might be in general, the defendant ought not now to be permitted to take advantage of it in this case, having attended by his attorney, the execution of the writ.

Holroyd, in support of the rule, said that a similar application in the case of *Turner v. Clark* (b) had been successful; and that the defendant in this case could not be said to have waved taking advantage of this objection by attending below, as the circumstance of the jurymen being debtors was not discovered till afterwards.

Lord KENYON, Ch. J. My doubt at first was whether the defendant had not waved taking advantage of this objection by appearing before the sheriff; but for the precedent's sake we ought to set aside this inquisition. His lordship also hinted that, if the sheriff had been made a party to the rule, perhaps the Court would have made him pay the costs of the application.

Rule absolute.

(a) Some of the jurymen were javelin-men attending the sheriff; but the Court

said there was no objection to them.

(b) *E. 31 Geo. 3. B. R.*The KING *against* The Inhabitants of LLANWINIO.Wednesday,
Nov. 23d.

BY an order of two justices, dated October 29th 1789, *A. Evan*, his wife, and five children, were removed in December 1790 from *Hilrbedin* to *Llanwinio*, both in the county of *Carmarthen*; the Sessions confirmed that order, subject to the opinion of this court on a case reserved.

The case stated that an alteration was made in the order of removal by one of the magistrates immediately after the order was signed by both, but in the presence of the other, and before

If the sessions draw a conclusion of fact that the taking of a tenement is fraudulent, or that it does not amount to 10*l.* per annum, it is decisive here, though they state all

the facts, and refer the consideration of those questions to this court.

An order of removal may be executed a year after it is signed, if the pauper's circumstances be not altered in the interval.

An alteration in an order of removal by one justice in the presence of the other, before it is delivered to the parish officers, does not vitiate it.

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it was delivered to the parish officers to be executed; and it was not re-sealed and re-delivered by the justices after the alteration. The appellants objected that the order was void in point of law on this ground, but the sessions over-ruled the objection. The case, after stating that the pauper was originally settled in *Llanwinio*, stated the evidence relating to a subsequent settlement in *Hilrbedin*, by taking two several tenements of the supposed yearly value of 3*l.* 10*s.* and 6*l.* 12*s.* 6*d.* concluding with an adjudication by the Sessions "that it was a fraudulent taking, and that it did not amount in the whole to 10*l.* *per annum.*" The Sessions however reserved the two points for the opinion of this court, 1st, Whether the original order were void on account of the alteration; and 2dly, Whether the pauper gained a settlement by taking the two tenements, notwithstanding the fraud, the parish of *Llanwinio* not being privy to the fraud, and there being contradictory evidence (a) as to the value.

Bearcroft and *Plumer*, in support of the order of sessions, said that the adjudication by the justices, on matters of fact, that the taking was fraudulent, and was not of the value of 10*l.* *per annum*, was conclusive. Neither did the alteration vitiate the order, because it was made in the presence, and with the consent, of the other magistrate, and before it was delivered to the parish officers.

Leycester, and *Douglas*, *contra*. The conclusion drawn by the justices was merely a matter of form, in order to raise the questions here; for they have expressly referred the consideration of them to this Court, and stated the whole evidence to enable this Court to form their judgment upon them. Another objection also arises on the case, that there was an interval of a year between the signing of the order by the justices and the execution of it by the officers.

LORD KENYON. Ch. J. There might be some weight in the last argument, if the circumstances of the pauper had been altered. But nothing of that kind is stated here; nor indeed is any question referred to us on this point. The objection arising from the alteration of the order is equally destitute of foundation; it is stated that the alteration was made in the presence of the other magistrate. Such an alteration, so made, would not vitiate a much more serious instrument than this, a warrant by which the life of a person is to be decided. And with regard to the principal question; though the case is very inaccu-

(a) Which was set forth in the case.

rately drawn, the conclusion drawn by the justices is decisive; for they expressly state that "it was a fraudulent taking, and that it did not amount in the whole to 10*l. per annum.*"

ASHHURST, and GROSE (*b*), Justices, assenting,

Both orders confirmed.

(*a*) Abf. Buller, J.

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against
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tants of
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The KING *against* The Inhabitants of NEWBURY.

Wednesday,
Nov. 23d.

THE Court of quarter sessions quashed a poor-rate, subject to the opinion of this Court on a case; which stated that previous to the appeal a regular notice was given by the appellant, Mr. *Page*, that he intended to appeal on these grounds; that he was not an inhabitant of the parish of *Newbury*, nor occupier of any property there; that the tolls of the navigation of the river *Kennet*, for which he was rated, were neither collected or due there; that he was not rateable at all for those tolls in *Newbury*, or if he were, not to the amount for which he was rated; and that the rate was for those reasons unjust and unequal. That, after proving service of this notice, the respondents put in the rate in question, and proved the due signing, allowance, and publication, of the same; in which the appellant was rated 40*l.* as occupier of the tolls of the navigation, of the yearly amount of 400*l.* That the respondents were then called upon by the appellant's counsel to support the assessment upon the appellant, which they declined, relying on the validity of the rate until impeached by evidence on the part of the appellant. The appellant produced no evidence whatever; and the justices, being of opinion that the respondents ought to have produced further evidence in support of the assessment, quashed the rate, subject &c.

If a party appeal against a poor-rate on the ground that he has no rateable property in the parish, the respondents must first establish their case.

Erskine, Milles, and Lane, in support of the order of Sessions, compared this to an appeal against an order of removal, where the established practice is for the respondents to begin. They said if there were any distinction between the two cases, there is a stronger reason in that case than the present why the appellants should begin; because the order of removal, being a judicial act, might be supposed to be entitled to credit in a court of justice before it was impeached, notwithstanding which it has been the constant practice of the respondents to begin by establishing their own order. Now as a poor-rate, which is made by the

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the parish officers, and is only a ministerial act, cannot in its nature be of such authenticity as a judicial act of two magistrates, there seems more reason why it should be supported in the first instance by those who made it. There is a further reason in this case why the respondents should have begun; because, the first question being whether or not the appellant occupied any property in the parish, the affirmative lay on those who asserted that he had; and it was impossible for him to prove a negative. At all events, this is a question of mere practice at the sessions, over which this Court has no control; the Sessions have a right to direct the mode of their own proceedings, and they have decided in this case that the *onus probandi* lay on the respondents.

Bearcroft, King, and Blackstone, stated that the practice at the *Berkshire* sessions had always been with them; where, after the respondents had proved the poor-rate to be regular in point of form, they have called on the party who supposed himself to be grieved by it to support the objection by evidence.

Lord KENYON, Ch. J. at first hinted that this Court ought not to interfere in such a case, to control the practice of the court of quarter sessions. But afterwards he said, that law, justice, and convenience, required that the respondents should begin in cases of this kind as well as on appeals against orders of removal; in which last cases the rule universally obtains. Here the first objection to the rate was that the appellant had no rateable property in *Newbury*; the respondents therefore should have shewn that he had some property, in respect of which he was liable to be rated: it was impossible for the appellant in the first instance to prove the negative. In writs of error, and appeals to the House of Lords, where each party is in possession of all the evidence on both sides, the party who impeaches the decision below always begins: but in a case of this kind, where it is an *ex parte* proceeding, and where the appeal comes on to be heard naked and destitute of all evidence before the Court, those who have done the act ought to establish the propriety of it by evidence.

ASHHURST, J. The respondents ought to have established their own rate. At all events we ought to give credit to the justices at the sessions that they know their own practice; and no ground is laid before us to warrant us in saying that they have acted wrong.

BULLER, J. My first doubt was about the propriety of any case being sent here to determine upon the practice of the court of sessions: but, as the case is here, I think we ought to give our opinion on that practice, and to lay down a general rule, which may be a guide in future to all the quarter sessions. And I see no objection to that which has been suggested by my Lord.

But *The Court* said in this case it would be proper to send it down again to the sessions to be heard (a).

(a) *J. Heywood, amicus curiæ*, said, after this case was heard, that at the *Yorkshire* sessions, where more appeals of this kind were lodged than in any other county, when the appellant objected to his being rated at all, it is the practice for the respondents to begin; but if he object to the quantum of the rate, then the *onus* lay on him.

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against
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The KING against The Inhabitants of St. MARY
THE LESS, DURHAM.

Wednesday,
Nov. 23d.

THE reverend *H. Egerton* appealed against a poor-rate made for the parish of *St. Mary the Less, Durham*, because he was over-rated; when the appeal was allowed, and the poor-rate amended, so that the appellant might be rated for two rooms only, part of his dwelling house, and for the garden behind it, as occupied by him together, of the yearly value of 5*l.* instead of being rated for the yearly value of 24*l.* at which the house with the stable and garden were charged in that assessment; "the Court of Sessions being of opinion upon the evidence given that the remaining part of the house and stable are not, nor have been, occupied by the appellant, and therefore that he ought not to be rated in respect of the same." And they also stated the following facts; The former occupier of the whole of the premises in question had been rated at 24*l.* yearly. In 1783 the premises were not rated, because they were not occupied. In *August* 1783, the appellant purchased the premises for 585*l.* and afterwards repaired the same; but neither he nor any other person has since such purchase inhabited or resided in the dwelling house, except as hereafter mentioned, but the keys of the house always remained in his custody. The appellant resides part of his time in his prebendal house in the college at *Durham*; during which residence he frequently for his own amusement uses a throw or lathe and other turning instruments in one of the rooms of the dwelling house in question for an hour or two in a day, and has three chairs and a table in that

If the owner of a house occupy part of it, he is liable to be rated to the poor for the whole, unless there be a distinct occupation of the rest by some other person.

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room; on many of those occasions he has been attended by a whitesmith and cutler to sharpen his tools, and assist him in his work; occasionally in the *Winter* season there has been a fire in that room, and in another of the rooms he has frequently kept corn for his horse; and these two rooms have been so used occasionally in the course of the present year. The appellant occupies the garden, and keeps a gardener to take care of that and another garden. And it was proved on the part of the appellant that the garden in question was worth 40s. a year, at which rate he was willing to be rated for the same. The gardener sometimes puts his flower-pots, shrubs, &c, and some of his working tools, into another part of the dwelling house, where other lumber belonging to the appellant is also sometimes put by his servants: but no person has ever slept or lodged in the dwelling house, nor has any household furniture (except as above) been kept therein since the appellant purchased the premises; except that the appellant has out of charity permitted a poor man and his wife to occupy and live rent-free in the kitchen, between which and the rest of the house the door communicating was stopped up. The stable has not been occupied for any purpose whatever for upwards of two years, and has been for that time unfit to be used as such: but the appellant in the hunting season of the years 1787, 1788, and 1789, made use of it and a small yard annexed to it as a kennel for his hounds. It further appeared that about five years ago a person offered to take the premises in question for 25l. a-year, which was refused.

Law and Chamber, in support of the order of Sessions, said it would be sufficient for them to rely on the conclusion of fact drawn by the justices at the sessions, that the appellant was not the occupier any other part of this house than the two rooms and the garden. In *R. v. Hurdis* (a) where the question was whether the appellant were or were not rateable under the circumstances of the case, this court were of opinion that they were bound by the adjudication of the sessions that "he was the occupier", notwithstanding the justices also stated all the circumstances which were the foundation of their opinion. But even if it were now competent to this Court to examine the propriety of the judgment of the sessions, there is nothing in reason to induce them to draw a different conclusion; since a party is not liable to be rated to the poor as being the *owner* of a house, but merely in respect of his *occupying* it. Here it ap-

(a) *Ante*, 3 vol. 497.

pears that the appellant only occupied a part of this house; for which only he ought to be rated. As to the occupation of the kitchen, that is not by the appellant; and the communication between that and the rest of the house being stopped, they are as much divided as if they were separate and distinct tenements.

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Bearcroft, contra. The question here is not on the quantum of the rate, but whether the party be rated for all the property for which he is liable. Now this was an entire house; part of which and also the garden the sessions have found were actually occupied by the appellant. And the voluntary occupation of part of his house will not exempt him from being rateable for the whole. Perhaps this Court might have been precluded by a conclusion of the sessions that he occupied *no part* of the premises.

LORD KENYON, Ch. J. If the sessions had confined themselves to the finding of the fact of occupation on the face of their order, the consequence stated would have followed: but that is the very question which they have left for the decision of this Court; for they say that on the evidence they were of opinion that the appellant only occupied certain parts of the premises, but they have stated all the facts which were necessary to enable us to draw the conclusion in law, whether, as in fact he occupied a part of the house, he is liable in law for the whole. Now it is stated that this gentleman occupied the garden and part of the house, his servants other parts, and a poor man another part: but these occupations were not distinct from his own. He ought therefore to be rated for the whole; for it would be attended with great inconvenience to draw such a line as has been attempted in this case between the occupation of one part of the house and another.

ASHHURST, J. It would be a very inconvenient practice to enquire in each particular case what rooms of a house the owner occupied, before he could be rated.

GROSE, J. I consider the appellant as the occupier of the whole house. If a person were to shut up his garrets, it would be no ground to exempt him from being rated for the whole house.

Order of Sessions quashed.

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Wednesday,
Nov. 23d.The KING *against* T. MEIN.

In a *quo warranto* information the defendant relied on an election by a homage consisting of 23 free tenants; the jury found on a special verdict that 21 of those persons were not free tenants; and this court held the election to be void.

THIS was an information in nature of a *quo warranto*, calling on the defendant to shew by what authority he claimed and exercised the office of portreeve of the borough and manor of *Fowey*, in *Cornwall*; to which he pleaded that his Royal Highness the Prince of *Wales* is seised in fee of the borough and manor of *Fowey*, in right of his dutchy of *Cornwall*, and that he and his ancestors have immemorially held a Court from time to time for the borough and manor by the steward of the Court or his deputy; that there is an immemorial custom within the borough and manor, for the homage of the free tenants of the borough and manor at such court held next after *Michaelmas* to elect and present to the steward or his deputy one of the free tenants, having been duly admitted upon the court-roll of the borough and manor, and having done his fealty to the lord of the borough and manor, as a fit and proper person to be portreeve of the borough and manor until the next court held within and for the borough and manor by the steward or his deputy, which person so elected and presented, being approved of and sworn truly to execute the office, hath been during all the time aforesaid portreeve of the borough and manor until the then next Court to be holden as above; that at a Court held after *Michaelmas* 1789 *vs.* on the 26th November 1789, by *J. Harvey* then deputy steward there, the homage of the free tenants of the borough and manor duly charged and sworn, *vs.* *T. Mein, P. Tonkin, and Others*, elected and presented to *J. Harvey* him (the defendant) then being one of the free tenants, having been admitted on the court-roll, and having done fealty &c, as a fit and proper person to be portreeve of the borough and manor until the next court &c; and that he was then approved and sworn &c.

The replication first denied the right claimed of holding the court, as alleged in the plea; 2dly, The custom for the homage to present &c; 3dly, That a court was held, as alleged; 4thly, That the homage of the free tenants did elect and present the defendant &c; 5thly, That *T. Mein, P. Tonkin, and J. M'Bride, &c.* [naming 20 others composing the homage,] were at the time of holding the court free tenants of the borough and manor, &c; on which issues were severally taken.

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At the trial before *Heath, J.* at the last *Spring* assizes in *Cornwall* the jury found the three first issues for the defendant; and a special verdict on the fourth, and fifth; stating (as to the fourth,) that the homage, consisting of the persons in the pleadings in that behalf mentioned, elected and presented the defendant; and as to the fifth that *T. Mein*, and *P. Tonkin*, two of the homagers in the pleadings mentioned at the time of holding the said court for the borough and manor of *Fowey* were free tenants of the borough and manor; and that *J. M^cBride &c.* (naming them) the other twenty-one of the said homagers, were not at the time of holding the said court free tenants of the said borough and manor; and that several other free tenants attended the said Court and requested to be sworn upon the said homage, and objected to the swearing of the said twenty-one, but *J. Harvey*, the then steward, refused such other free tenants, and swore the said twenty-one on the said homage. But whether upon the whole matter &c.

Crowper, for the Crown, contended that on this verdict there must be judgment against the defendant, he having relied on an election by a homage consisting entirely of free tenants, which is expressly negatived by the finding of the jury. The question here is not whether two homagers alone could elect, but whether as twenty-one other persons, who were not free tenants, were associated with two who were, the election by all be valid; and that such an election cannot be supported is clear, whether it be considered on the general law on this subject, or on the circumstances of this case. For in all cases of election the act of the majority is binding, and is considered as the act of the whole number. 21 *Ed. 4. fo. 27. 70.* Case of *The Chamberlain of the City of London*, 3 *Leon. 264*; 5 *Rep. 62.* S. C. 1 *Rol. Abr. 514. pl. 6.* *Dav. Rep. 48.* *R. v. Grimes*, 5 *Burr. 2601.* So if this be considered in the nature of an inquest, to enquire for the lord, and to present &c, the act of the majority is the act of, and will bind, the whole. The only exception to this is that of a petit jury: but the very exception proves the general rule. Then if the majority of these free tenants bound the rest, it follows that this presentment is bad. The only ground on which it can be contended that this election may be supported is this, that as two are a sufficient number to make a homage, and as there were two in this case, this presentment should be considered as their act, and the other twenty-one may be rejected. But, before they can be reject-

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ed, it should appear that the remainder will be the same after they are deducted as before. But, by deducting those twenty-one, the election might have been different; and there are no means of discovering how the two real free tenants voted. If they voted in a minority, the election is clearly void; if they were equally divided, then there was no election; and, even if they were unanimous in voting for the defendant, perhaps they were influenced so to do by the others. In corporation meetings, it has been frequently held that when any act is to be done by the corporation, and one of the corporators has not been summoned, the acts of the meeting are void: and the reason given is because though he could not have formed a majority by himself, yet he might have influenced the others. *Kynaston v. The Mayor &c. of Shrewsbury*, 2 Str. 1051. *Sir Charles Musgrave v. Nevinson*, 1 Str. 584. 2 Ld. Raym. 1358. and *R. v. May*, 5 Burr. 2681. If therefore the absence of one, who has a right to be present, will vacate an election, *a fortiori* will the presence of many who have no right to attend, especially if they constitute a majority of the whole meeting. There being no case in the books similar to the present, it may not be improper to refer to analogous cases. By 11 Hen. 4. c. 9. no indictment is to be made but by inquest returned by the sheriff, and if any be made to the contrary, the same shall be void. Lord Coke (a), commenting on this statute, mentions the case of *R. v. Scarlet*, where the rest of the great inquest, giving faith to him, indicted seventeen honest and good men upon divers penal statutes, and it was "resolved and adjudged that albeit *he alone* was sworn without the return of the sheriff, and all the rest duly returned, yet this case was within the statute, and all the indictments found by him and the rest were void; for hereby it appeared what mischief such an one might do." And from the word "alone" Lord Coke refers to 7 H. 4. fo. 10. pl. 16. where on a challenge to the array because it was made by the nomination of the plaintiff's servant, who was put upon the panel, it was said "*Si un soit mis en le panel al denominatio d'un party, tout l'array est quassable; quod conceditur per omnes justiciarios.*" So in 11 H. 4. fo. 41. pl. 8. an indictment was quashed because one of the jurymen was an outlaw. Or if this be considered on the ground of embracery, the presentment is bad. It is said in 1 Hawk. b. 1. c. 85. s. 1. that any attempt to influence a jury by promises or persuasions, as well as money, is embracery; and in sect. 7. that if an act of

(a) 3 Inst. 33.

embracery were not known before the trial of a cause, so that the party, to whose prejudice it was intended, had no opportunity to prevent the ill effects of it, by challenging the juror who was practised upon, it will be a good ground to move the Court to set aside the verdict." Now this is a stronger case; for here the homagers were objected to before they were sworn. But if the law be not settled in this particular case, arguments of convenience and justice will have great weight in settling what the rule should be; and it seems that a decision in favor of the defendant's election may be attended with serious mischiefs to the Public, in giving a sanction to the secret views and misconduct of the steward of the court, and with injury to the free tenants, who have a right to be sworn on the homage. The right of election is a valuable privilege in the electors; and here all the free tenants are interested in this question, inasmuch as each may in his turn be on the homage and become an elector. It is also of importance to the Public that the purity of elections should be preserved; and the situation usurped by the defendant was the principal office in the borough.

Dampier for the defendant. The grounds on which the defendant's election may be supported are shortly these; this Court was in the nature of a court baron; the free tenants are the judges there, the steward is merely the register; in such a court two are sufficient to make a homage; and as this presentment was made by two free tenants, it is valid, notwithstanding others were joined with them. The act of the steward, in admitting others on the homage to the prejudice of the two free tenants, ought not to vitiate their proceedings. It has been objected that it does not appear that the two free tenants concurred in the defendant's election: but, on the verdict, it must be taken that they did; for the finding is that they and others did present and elect him. The twenty-one may be rejected; and then the finding that the presentment was made by the two free tenants and also by the twenty-one others will not affect this question. It is the same as if the bye-standers in a court were added to the jury. Neither is the refusal of the steward to swear on the homage those whom he rejected any objection to the title of the defendant, who was elected by those who were entitled to be on the homage: he was not obliged to swear more than those two. Whether the steward acted only from ignorance or from corruption, is immaterial in this question; as it does not appear that the two free tenants were in collusion with him, they

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they ought not to suffer for his acts, not having any control over him. The act of a bare ministerial officer ought not to prejudice the rights of the free tenants, or to vitiate the title of the defendant, who was presented by those free tenants. At the most, even supposing that the steward acted from corrupt motives, it is only a foundation for a criminal prosecution against him. This is not like the cases cited of elections being void because one elector was not summoned; for in some of those the election would not have been good, even if it had been made with the unanimous consent of all present.

LORD KENYON, Ch. J. This proceeding was instituted for the purpose of enquiring what title the defendant had to the office of portreeve of *Fowey*; in his plea he set forth his title, alleging that the Prince of *Wales* is lord of the borough and manor of *Fowey*, in which there is an immemorial court held before the steward or his deputy, and that at that court the homage consisting of the free tenants have immemorially elected and presented a portreeve for the ensuing year; he then stated, as a fact, that the homage of the free tenants, consisting of two persons who are there named, and others, (not named) elected him at one of these courts. The replication, after taking issue on the several parts of the defendant's plea, mentioned the names of the twenty-one other persons, and stated that they were not free tenants; and the jury have found that those twenty-one persons were not free tenants of the borough and manor. Then the question is, whether this election, which the defendant himself said should be made by the homage consisting of the free tenants, and which the verdict says was not so made, can be called a legal election? The bare stating of the question is sufficient to decide it. It is a point upon which there cannot be a difference of opinion. But the defendant's counsel said, that this Court is in the nature of a court baron: he should have defined the meaning of a court, which must be admitted not to be a court baron, but supposed to be in the nature of a court baron. In a court baron the homage are the judges, and the court is held before them: but here it is expressly stated that this court was held, not before the free tenants but, before the steward or his deputy; and it is stated to be a prescriptive court. Therefore I do not know how we can infer that two free tenants constitute a court. It was also said that though the steward were not the judge, he was *quà* judge: but Lord *Holt* strongly reprobated the idea of a person, not a judge, being *quà* judge. But,

be

be this as it may, the defendant relied on this, among other facts, that his election was made by a homage consisting of twenty-three free tenants, and the jury have expressly negatived that twenty-one of them were of that description.

ASHHURST, J. When a defendant makes it a part of his title that a Court, at which he was elected, was held before twenty-three homagers, he cannot afterwards rely on this, that two of them were of that description. Here, the defendant stated that the homage consisted entirely of free tenants; but the jury negatived that fact.

BULLER, J. and GROSE J. assenting,

Judgment for the King.

(a) Vide 2 *Ld. Raym.* 950.

IRVING *against* WILSON and Another.

Tuesday,
Nov. 22d.

THIS was an action on the case to recover the sum of 2*l.* 11*s.* as money had and received by the defendants to the plaintiff's use. At the trial at the last *Carlisle* assizes before *Thomson*, Baron, it appeared that the defendants, who are custom-house officers, had seized some hams near *Carlisle*, which the plaintiff was sending in three several carts from *Scotland* to *Carlisle*. The plaintiff obtained one permit for the whole, but owing to some accident two of the carts were at the distance of two miles behind the other when the defendants met the first and demanded the permit; the driver informed them that the permit was with the other carts, which came up in an hour and a half afterwards, before the first reached *Carlisle*, but not till the officer after waiting some time without seeing the other carts had made the seizure. They were all three driven to the custom-house at *Carlisle*, the defendants saying they could not release them unless the collector were applied to. When the whole was explained to the collector, he said he would have no concern in the taking. And the defendants then refused to give up the carts with the cargoes, unless the plaintiff would give them 2*l.* 11*s.*; which he accordingly did. It was objected on the part of the defendants that the plaintiff, by this transaction with revenue officers, had incurred a penalty of 50*l.*, and that he could not recover back the money which he had paid to have the goods, which had been seized, returned to him; and the plaintiff was non-suited, with leave to move to set that non-suit

If a revenue-officer seize goods as forfeited, which are not liable to seizure, and take money of the owner to release them, the latter may recover back the money in an action for money had and received. In such an action a month's notice need not be given under the 23 G. 3. c. 70. s. 30.

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afide, and to enter up a verdict for him, if this Court should be of opinion that the plaintiff could maintain this action.

A rule having been obtained on a former day by *Law* to shew cause why the non-suit should not be set aside,

Cockell, Serjt. now shewed cause; saying that this payment must be considered either as a bribe to the officers for the release of the goods, which they had a probable cause to seize, in which case the plaintiff and defendants were in *pari delicto*; or as a voluntary payment to the officers for their trouble; in either of which cases the plaintiff could not recover back the money paid. But, in whatever light the payment is considered, as it is admitted that this action is brought against the defendants as custom-house officers, for an act done by them in that character, they were entitled to a month's notice before the action was brought, under the 23 *Geo.* 3. c. 70. s. 30. & 24 *Geo.* 3. c. 46. s. 39. for they ought to have had an opportunity of tendering amends.

Lord KENYON, Ch. J. The revenue laws ought not to be made the means of oppressing the subject. Here, a permit having been granted for the whole quantity of goods, and which was with the other carts behind at the time of the seizure, the seizure was clearly illegal. The permit, for the entire quantity, could not be separated and distributed to each of the carts. And therefore whatever ground of probability there was for stopping the first cart, yet after the matter was cleared up, there was no pretence for making a seizure; and it was highly improper in the officers to take the money. If goods liable to a forfeiture be forfeited, the officer is to seize them for the king; but he is not to be permitted to abuse the duties of his station, and to make it a mode of extortion. Here the defendants took the money under circumstances, which could by no possibility justify them; and therefore this could not be called a voluntary payment: but it was extorted from the plaintiff, and in that case no notice to the defendants was necessary.

ASHHURST, J. I agree that if this money had been paid as a bribe, both parties would have been in *pari delicto*, and the plaintiff would not be entitled to recover. But here the plaintiff was in no fault whatever; this money was not paid as a bribe; for the goods were not liable to seizure. Neither was it a voluntary payment; for when the defendants had stopped the goods, the plaintiff was in their power. The defendants acted right

right in stopping the goods at first; but when the permit came up, there was no pretence to detain them; still less to take the money. It was a payment by coercion; and which the plaintiff may recover from the defendants as money unconscientiously received by them.

GROSE, J. (a). If an officer seize goods as forfeited, he does it *colore officii*: but if he take money for delivering up the goods, there is no pretence to say that that is done *colore officii*: and such money may be recovered back again in an action of this kind. I admit that in an action of trespass, or tort, the officers are entitled to notice under the 23 Geo. 3. c. 70. s. 30.; because they ought to have an opportunity of tendering amends: but that act does not extend to an action of *assumpsit*.

Rule absolute.

(a) Abf. Buller, J.

The KING against WILSON and Others.

THIS was an information against the defendants for obstructing an excise officer in the execution of his duty; to which they suffered judgment to go by default; and being now brought up for judgment, affidavits were read on the part of the prosecution, in aggravation of punishment.

Erskine and *Piggot*, for the defendants, wished to have an opportunity of answering these affidavits, alleging that they could not come prepared to answer the matter of which they could have no previous information. This was resisted by

The *Attorney-General* on the usual practice of the Court, which he said was founded on reason; for that the defendants could not be taken more by surprise now than they would have been if the matter had gone to a regular trial, where the defendants must have been prepared to make their defence.

Per Curiam. It is not the practice, in general, to give the defendant an opportunity of answering at a future time the affidavits produced by the prosecutor; and, as far as these affidavits have already gone, there is no reason to break through the general rule in this particular case. When a defendant is brought up for judgment, the only object which the Court have in view is to discover the real truth of the transaction; and it is much more probable that that object will be attained by the practice which has hitherto prevailed, which requires that each party should come prepared to disclose all the circumstances,

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against
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When a defendant, who has suffered judgment by default in a criminal prosecution, is brought up for judgment, each party should come prepared with affidavits disclosing his own case (if he mean to produce any affidavit at all;) but if in the course of the inquiry the Court wish to have any point further explained, they will give the defendant an opportunity of answering it on a future day.

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circumstances of his case, than by a contrary practice which would prove a source of infinite perjury. In the case of the *King v. Archer* (a), where the prosecutor produced affidavits, in aggravation, to shew a continuation of the defendant's malice by expressions used subsequent to the time of the indictment, the Court thought it reasonable to allow the defendant an opportunity of answering those affidavits, because it could not be supposed that he could come prepared to answer that which was not contained in the indictment. So in this case if, in the course of hearing these affidavits, we should be of opinion that any point is not fully and sufficiently explained, we will give the defendants an opportunity of explaining such part of the charge.

(a) Ante 2 vol. 203. n.

Friday,
Nov. 25th.

The KING against The Justices of DERBYSHIRE.

By an inclosing act an appeal was given to the next sessions within six months after the cause of complaint: an appellant moved the court of sessions (in due time) to receive and respite his appeal to the next sessions, which was refused; and this court would not grant a *mandamus* to the justices at the sessions to receive it.

BY an act for dividing and inclosing *Belper* and *Chevin Ward* in *Derbyshire*, an appeal is given to the party aggrieved by any act of the commissioners to the Court of Quarter Sessions "within six calendar months after the cause of complaint, at which said general Quarter Sessions the justices are authorized and required to hear and determine the matter of every such appeal, and to make such order as to them shall seem meet and reasonable;" and their determination is final. The commissioners having made a drain in *Belper*, (which it was supposed was not warranted by the act), and included the expence of it in an assessment on the proprietors of the inclosed lands, an action was brought for the purpose of trying the legality of the act of making the drain; and some of the proprietors, wishing to have an opportunity, in case this action should be determined in their favor, of investigating the assessment, made a motion at the last *Michaelmas* Sessions for the county of *Derby* to receive an appeal against that assessment and respite the hearing of it till the next Sessions, which was refused by the justices, because the following sessions would not happen before the expiration of six (a) months after the cause of complaint. A rule was afterwards obtained by

D. P. Coke, calling on the defendants to shew cause why a *mandamus* should not issue, commanding them to receive this appeal. Cause was now shewn by

(a) The cause of complaint was five months before the *Michaelmas* Sessions.

Chambre, Balguy and Clarke, who relied on the *King v. the Justices of the North Riding of Yorkshire* (a); observing that this was even a stronger case than that, because this act of parliament directs that the appeal shall be heard and determined at the next sessions. It is extremely doubtful whether under this act the Sessions could have adjourned the hearing of the appeal, because then it would not have been heard within six months after the cause of complaint. But, even if they had a discretion, it is a sufficient answer to this application that they have exercised their judgment upon the subject.

The Court had no doubt but that the clause in the act was compulsory on the justices to *receive the appeal*, but not to *respite* it. And they said that, as this was a conditional motion, only to enter the appeal in case the Sessions would agree to respite the hearing, they could not compel the justices now to receive it.

Rule discharged.

(a) Ante 3 vol. 150.

WARD *against* MACAULEY and Another.

THE plaintiff was the landlord of a house, which he let to Lord Montfort ready furnished; and the lease contained a schedule of the furniture. An execution was issued against Lord Montfort, under which the defendants, sheriff of *Mid-
dlesex*, seized part of the furniture, notwithstanding the officer had notice that it was the property of the plaintiff. For this the plaintiff brought an action of trespass against the defendants: At the trial Lord Kenyon thought that trespass would not lie, and that the plaintiff should have brought trover: a verdict however was taken for the plaintiff for value of the goods, with liberty to the defendants to move to enter up a non-suit if this Court should be of opinion that the plaintiff could not recover in this form of action.

Mingay obtained a rule for that purpose on a former day; against which

Erskine now shewed cause. The plaintiff may maintain trespass on a *constructive* as well as an *actual* possession. *Bro. Abr. Trespass pl. 303*. In *Smith v. Milles* (a), where indeed the sheriff was excused because he could not be made a trespasser by relation, *Asbburst, J.* in giving the judgment of the Court said

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SHIRE.

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A. having let his house ready furnished to B. cannot maintain trespass against the sheriff for taking the furniture under an execution against B., though notice were given that the goods belonged to A.

(a) Ante 1 vol. 480.

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MACAULEY.

"to entitle a man to bring trespass, he must at the time when the act was done, which constitutes the trespass, either have the *actual* possession of the thing, which is the object of the trespass, or else he must have the *constructive* possession in respect of the right being actually vested in him." The right to personal property is not divested out of the owner because he gives the temporary use of it to another. In the case of a carrier, the owner may maintain trespass on the ground of his having the general property, and the carrier trover on account of his special property.

LORD KENYON, Ch. J. The distinction between the actions of trespass and trover is well settled: the former is founded on possession, the latter on property. Here the plaintiff had no possession; his remedy was by an action of trover founded on his property in the goods taken. In the case put of a carrier, there is a mixed possession; actual possession in the carrier, and an implied possession in the owner.

BULLER, J. The carrier is considered in law as the servant of the owner, and the possession of the servant is the possession of the master.

Per Curiam,

Rule absolute.

(a) Ante 1 vol 480.

Friday,
Nov. 25th.

The KING against CARTWRIGHT.

The 9 Geo. 2. c. 35. s. 26. which enacts that prosecutions for assaults on revenue-officers may be tried in any county, only extends to assaults on them *quod* officers. And a defendant having been found guilty on an indictment of a common assault on the prosecutor who was an excise-officer, this Court arrested the judgment, though the prosecutor was described to be an excise-officer, the offence being laid in *Surry* and the venue in *Middlesex*.

THIS was an indictment against the defendant for an assault upon an excise officer. Several counts charged the offence as committed against the prosecutor while *in the exercise of his office*: another count only charged a *common assault*; but even this described the prosecutor to be an *excise-officer*. And all the counts stated the offence to have been committed in *Surry*. The *venue* was laid and the trial had in *Middlesex*; when the defendant was acquitted upon all the counts, but that charging him with a common assault, of which alone he was found guilty. A motion was made in arrest of judgment for a mis-trial, on the ground that the 26th clause in the 9th Geo. 2. c. 35. which enacts "that for the better and more impartial trial of any indictment or information, which shall be found, commenced, or prosecuted, for any assault made or committed upon any of the officers of the customs or excise, every such offence shall and may be inquired of, examined, tried, and

determined,

“determined, in any county in *England*, in such manner and form as if the same offence had been therein committed,” only extended to assaults on officers when in the exercise of their office.

The *Attorney-General*, *Beacroft*, and *Wood*, for the Crown, contended that the words of the statute were general, and warranted no such limited construction as was attempted to be put on them. They stated, that they were instructed, that there had been many instances of similar convictions, and judgments, upon them; and that the general course of practice had been so. And the benefit intended to be conferred on revenue officers by the act will be very materially defeated, if a more narrow construction prevails; for their situation necessarily exposes them to the resentment of those, whose goods are seized, and of their connections; and if they are assaulted for having done their duty on any former occasion, and cannot obtain a fair trial in the place where such assault happened, the probability of which is presumed by the act, the mischief is just as great as in the instance admitted to be provided for by the act.

Erskine, for the defendant, argued from the absurdity of such an extensive construction as was contended for, and from the general purviews of similar statutes made in *pari materia*; which were passed for the protection of the revenue, and could never have been intended to apply to private quarrels between its officers and other persons. The protection afforded to excise and custom-house officers is *quâ officers*; and must be meant only while they are officiating *as such*.

The Court were all of opinion that the 26th section of this act of parliament must be confined to prosecutions for assaults on the revenue officers when in *the execution of their office*, and that the mischiefs from a contrary determination would be intolerable. And

BULLER, J. added that the intention of the Legislature might be collected from other parts of the act, which was made for the sake of the revenue, as its title imported. The first section enacts that all persons who have incurred penalties and forfeitures against the revenue laws, “and any persons who have beat, abused, obstructed, or hindered any officer of the customs or excise in the due execution of their duty,” &c. shall be by the authority of that act acquitted &c, of and from all the said offences, except as is therein excepted. Now it is fair to infer that the Legislature meant to extend the indemnity to all those cases
in

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in which by the subsequent clause they gave the right of changing the venue. But the first clause must clearly be confined to assaults on the revenue officers in the execution of their duty: a mere personal assault on a prosecutor not in the exercise of his office, but who happened to be an officer, would not be pardoned by this act. Then the subsequent clause, on which this question arises, may be construed with the same restriction and qualification; and, when it speaks of "assaults on any of the officers of the customs or excise," it means assaults on them *quod* revenue officers.

Rule absolute.

Saturday,
Nov. 26th.

Exposition of the Rule of Court of *Tr. 31 Geo. 3.*

Ante 379.

The rule of *Tr. 31 G. 3.* which orders that after *Mich.* term next no attornies acting as writers or clerks to other attornies shall take clerks under articles, and declares that no service with attornies so acting shall be good service, applies to services performed as well before as after *Mich.* term.

BALDWIN, after adverting to the late rule of *Tr. 31 Geo. 3.* relating to attornies' clerks, whereby it is "Ordered that "from *Michaelmas* term [then] next ensuing, no attorney who "shall be retained or employed as a writer or clerk by any other "attorney shall, during the time of such employ, take or have "any clerk under articles; and that no service to any such attorney under articles, during the time that such attorney shall "be so employed by any other attorney, shall be deemed good "service &c," desired the opinion of the Court, upon the subject of the assignment of an articulated clerk, who had served an attorney for three years under such circumstances, whether the rule in question was intended to have a retrospective operation with respect to services already performed, or merely to such as were to commence from the present *Michaelmas* term. The former construction, he suggested, would press very hard upon individuals, who had already served a great part of their time in this manner under a general persuasion, warranted by the common practice, that such service was valid. But

The Court said that the rule, which was only made in conformity to, and in furtherance of, the act of parliament (a), could not be limited in restraint of future services of this nature only; for the mischief intended to be remedied was the admission of improper persons as attornies; which required as much to be prevented now as at any future time. And no hardship could be complained of, as the rule was not introductive of any new regulation, but confirmatory of an old one.

(a) 22 Geo. 2. c. 46. s. 7.

1791.

MESSIN *against* Lord MASSARENE and Wife.Monday,
Nov. 28th.

THE plaintiff, having obtained a judgment against the defendants in the *Ghatelet of Paris*, brought an action of *assumpsit* here on that judgment, in which the defendants suffered judgment to go by default; whereupon

Walton obtained a rule, calling on the defendants to shew cause why it should not be referred to the Master to see what was due for principal and interest, and why final judgment should not be entered up for such sum, without executing a writ of enquiry.

Holroyd was now shewing cause, on the ground that there was no instance in which such a rule had been made; and that the reason (a) of the former cases (b) on bills of exchange did not extend to this; when

Lord KENYON, Ch. J. said, this is an attempt to carry the rule farther than has yet been done: and as there is no instance of the kind, I am not disposed to make a precedent for it.

BULLER, J. Though debt will lie here on a foreign judgment, the defendant may go into the consideration of it.

Rule discharged.

(a) The value of the Foreign money is uncertain. *Vid. Bagshaw v. Playn, Cro. El. 536.* and *Rands v. Peck, Cro. Jac. 617.*

(b) *Shepherd v. Charter, ante 275. Rash-*

leigh v. Salmon, H. Bl. Rep. C. B. 252. Andrews v. Blake, Ib. 529. and Longman v. Fenn, Ib. 541.

The defendant having suffered judgment by default in an action of *assumpsit* on a foreign judgment, the Court would not refer it to the Master to see what was due, and give the plaintiff leave to enter up final judgment for such sum, without executing a writ of enquiry.

The KING *against* The Sheriff of MIDDLESEX.Monday,
Nov. 28th.

IN a cause of *Metcalf* against *Aylett* an attachment was obtained against the sheriff for not bringing in the body. It appeared that bail was put in and justified, but there was no service of the rule allowing the justification: but the plaintiff was present at the time of justifying, and opposed the bail though unsuccessfully. A rule was obtained by

Garrow, to shew cause why the attachment should not be set aside, on the ground that the party's having been present, and opposed the bail, dispensed with the necessity of the defendant's serving the plaintiff with the allowance; for that the only

Bail is not regularly put in till the allowance of it has been served, even though the plaintiff oppose the justification. And the sheriff is liable to an attachment for not bringing in the body, if the allowance be not served though the bail justified

ance be not served though the

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The KING
against
The Sheriff
of MIDDLE-
SEX.

use of such service was in order to give the plaintiff that information which in this case he notoriously had without it.

Mingay, contra, now shewed cause; insisting upon the regularity of the attachment, because the plaintiff had not been served with the allowance; which he contended to be necessary, not only that the other party might have notice that such a step was taken in the cause, but because a contrary rule would tend to defraud the Stamp-office of the duties, and the officers of the court of their fees; and he said that the same point had been determined in *Booth v. Preston*, 29 Geo. 3. B. R.

Lord KENYON, Ch. J. Though we are not a court of revenue, we are bound to take care that the revenue is not defrauded. Bail is not regularly put in till the allowance of it has been served; and it is of importance that all the steps prescribed by the practice of the Court should be followed. If we were to suffer this exception to prevail, it would enable the defendant's attorney to put into his pocket those duties which belong to the revenue.

Rule discharged.

Monday,
Nov. 28th.

SOWERBY *against* HARRIS.

It is sufficient to satisfy the provisions of the annuity act, 17 G. 3. c. 26. to state the true consideration for the purchase of the annuity in the memorial by way of recital.

THIS was a rule to shew cause why an annuity should not be set aside for a defect in the memorial, in not stating the consideration of the annuity, as required by the 17 Geo. 3. c. 26. § 1. The memorial, as to this part of it, was as follows, after stating the date of the deed and names of the parties; "whereby *Harris*, in consideration of 2100*l.* paid, and which was in fact paid, to him by *Sowerby* granted to the latter an annuity of 300*l.* &c." This motion was made, and the opinion of the Court given, before it was discovered that the memorial contained these words "and which was in fact paid;" so that the case adjudged was on a supposition that those words were omitted. In fact the sum of 2100*l.* mentioned as the consideration was paid by a banker's check (a), which was afterwards paid by the banker to *Harris's* attorney, who deducted thereout 650*l.* for a demand which he had on *Harris*.

Shepherd, in support of the rule, gave up the point of the money being deducted, as the whole sum had been paid to *Harris's* agent; but relied on the cases of *Robinson v. Howell* (b),

(a) *Vide Rumball v. Murray and Another*, ante 3 vol. 298.

(b) *E. 31 Geo. 3. F. R.*

and *Willey v. Wheeler* (a), where it was held that the consideration of the annuity ought to be averred in the memorial, as a substantive fact, and should not be stated there by way of recital. And he said that that was not required without good reason; for a contrary rule would open a door to fraud, and would be the means of introducing false recitals.

Erskine, and *Gibbs*, *contra*. The annuity act does not direct the mode in which the consideration shall be stated in the memorial; if the real consideration appear in the memorial in any way, it is sufficient to satisfy the act.

Lord KENYON, Ch. J. The object of the act of parliament, in requiring the consideration of the annuity to be stated in the memorial, was that the Public should have complete information of the real transaction between the parties. And that intelligence will be equally conveyed to the world, whether it be averred as a positive fact that the consideration was paid, or only stated by way of recital. In both cases the parties may attempt to commit the fraud of introducing a false fact into the memorial; but that is always open to examination.

The Court thought it proper to discharge this rule with costs, the granting of the annuity appearing to be a fair transaction.

(a) *Tr. 21 Geo. 3. B. R.*

KENNARD *against* JONES.

Monday,
Nov. 28th.

BALDWIN moved that all proceedings might be stayed in this action; on an affidavit by the defendant that, on applying to the plaintiff's attorney to know what the debt was, he said that it was a guinea and an half. He contended that as the debt was under 40s. the Court could not take cognizance of it; and they would not suffer the defendant to be harrassed by going on to trial. This being admitted to be a novel application,

If it appear to the court that the debt sued for is under 40s. they will on motion stay the proceedings before trial.

The Court had some doubt;

BULLER, J. saying that the practice had been not to grant such rules in this Court, unless the demand appeared to be under 40s. on the record: but Lord *Kenyon* saying that he remembered many applications of this sort in the Exchequer, *The Court* granted a rule *nisi*: against which,

Manley now shewed cause, not denying the fact, but stating that the application ought to have been made sooner, if at all; for that

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against
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that the defendant was under short notice of trial; but he offered to refer the whole to the Master.

LORD KENYON, Ch. J. (stopping the other side) said that that offer could not be acceded to now. This is a very general question which concerns the practice of the Court, whether it shall be permitted to parties to sue in the superior courts for such small sums as those under 40*s*. Now that is expressly prohibited by act of parliament^(a); and therefore upon consideration we are of opinion that the rule should be made absolute, but not with costs, as this is the first application of the kind.

Per Curiam,

Rule absolute.

^(a) *Vid. 6 Ed. 1. c. 8.*

Ex parte WILLIAMS. (a)

The Court will refer an attorney's bill to be taxed, though all the business be done at the quarter sessions.

LORD KENYON, Ch. J. said that, on further enquiry from the officers of the Crown Office, he understood that there were several instances, in which this Court had referred an attorney's bill to be taxed, though the whole business had been carried on at the court of quarter sessions.

^(a) *Vid. ante 124.*

REGULA GENERALIS.

IT IS ORDERED That in future all writs shall be returned by the sheriff on the day on which the Rule for returning the same shall expire, and in default thereof the plaintiff shall be at liberty to move for an attachment on the next day ^(a).

^(a) This rule arose out of a case of *The King v. The Sheriff of Surry*, where the sheriff had not returned the writ till the morning of the 7th day, but before the sitting of the court; to remedy which practice the above rule was made.

END OF MICHAELMAS TERM.

C A S E S

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ARGUED and DETERMINED

IN THE

Court of KING'S BENCH,

IN

Hilary Term,

In the Thirty-second Year of the Reign of GEORGE III.

GOODTITLE on the Demise of REVETT *against*
BRAHAM.

Tuesday,
Jan. 24th.

THIS ejectment was tried at bar by a special jury from *Suffolk*, and, by consent, some talesmen from *Middlesex*. The lessor of the plaintiff claimed as the heir at law, the defendant as the devisee, of Mrs. *Elizabeth Brabam*, the person last seized. At the outset of the cause a question arose who was entitled to the general reply; and the Court decided that if the plaintiff proved his pedigree, and stopped, and the defendant set up a new case, which the plaintiff answered by evidence, which ultimately went to the jury, the defendant should have the general reply; and *Buller, J.* said that he had so ruled it in a cause (a) at *Winchester*.

The plaintiff then stated his pedigree, which was admitted; and the defendant proved the will, which was impeached on various grounds, but chiefly on those of forgery, and undue influence. There were two parts of the will, to each of which were three signatures and a seal; and with one of them was sealed up a

The defendant in ejectment is entitled to the general reply where the plaintiff, claiming by descent, proves his pedigree and stops, and the defendant sets up a new case in his defence, which is answered by evidence on the part of the plaintiff.

A clerk of the Post-office accustomed to inspect franks for the detection of

forgeries may be examined as a witness to prove that the hand-writing of an instrument is an imitated and not a natural hand, and also to prove that two writings suspected to be imitated hands were written by the same person.

(a) *Doe d. Farr v. Hicks, Sum. Assizes 1789.*

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GOODTITLE
against
BRAHAM.

paper, purporting to be instructions for the will, in the handwriting of the testatrix, and signed and sealed by her; at the bottom of which was a memorandum, that the testatrix at the time of executing the will requested the attesting witnesses to sign the paper for her, which she declared to be her writing; and they had signed it accordingly. This memorandum was in the hand of one *Reilly*, who was supposed by the plaintiff to be the contriver of the will, and who was considerably benefited by it. The plaintiff's case, as to the forgery, consisted of evidence that the testatrix was incapable of writing a paper of such length as these instructions, and hardly able to sign her name; of declarations in her life-time that she never would make any will; and of some contradictions by the attesting witnesses. The plaintiff then called two clerks of the Post-office, who swore that they were used to inspect franks and detect forgeries. They were then asked whether, from their general knowledge of writing, the instructions were a natural or an imitated hand: this question was objected to, but allowed by the Court; and the clerks swore that the hand was imitated. They were then asked if they could judge whether the instructions were written by the person who wrote the memorandum: This question was also objected to, as being a comparison of hands; but allowed by the Court. Lord *Kenyon*, Ch. J. mentioned a case where a decypherer had given evidence of the meaning of letters without explaining the grounds of his art, and where the prisoner was convicted and executed. And *Buller*, J. said it was like the case of *Wells Harbour*, where persons of skill were allowed to give evidence of opinion. The clerks then swore that from their knowledge of the similarity of hands they were sure that the instructions and memorandum were written by the same person. They also swore that all the signatures to the will, and the signature to a power of attorney to surrender copyholds to the use of the will executed afterwards, were imitated and not natural writing. On cross-examination they admitted that they had never detected an imitation of the hand of a very old person, who wrote with difficulty, and might be supposed frequently to stop. That their principal means of knowing was by seeing whether the letters were *painted*, that is, gone over a second time with the pen, which they admitted might happen to any person from a failure of ink. Other signatures of the testatrix, proved by unsuspected persons, were then shewn to these witnesses; one of these signatures was sworn to be genuine by

by one of them, and by the other to be imitated.—Lord Kenyon, in summoning up to the jury, said he should leave the question of forgery on the evidence they had heard, without any observations.

Evidence was also given on the ground of influence. The jury found for the plaintiff (a).

Mingay, Partridge, Shepherd, Garrow, Gibbs, Raymond, and Jermyn, for the plaintiff: and *Erskine, Bower, Law, Le Blanc, Serjt. Baldwin, and Wilson*, for the defendant.

(a) In a former ejectment brought by the present defendant, and tried at the last Spring assizes at Bury, before Ashurst, J. the jury found in favour of the will.

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GOODTITLE
against
BRAHAM.

DANIEL against PHILLIPS.

RUSSELL shewed cause against a rule for quashing a *certiorari*, which had issued to remove a cause from the borough court of *Caermarthen* into this court. Two objections had been made to the issuing of the writ; 1st, That it was directed to the mayor, commonalty, and burgeses, which was the name of incorporation; whereas it ought to have been directed to the mayor, recorder, and town-clerk, before whom the court was holden.

The Court said he need not trouble himself to answer this objection; for however the proper parties, in whose keeping the record was, might have objected to make any return of it on account of the writ of *certiorari* being improperly directed, yet having in fact returned the record into this court, no such objection could be started by third persons.

The second objection was that the damages were laid under 40s. and therefore this Court would not take cognizance of it. To this it was answered that however that might have held as an objection in general cases, where the action was brought to recover a debt under 40s., yet this was an action for an assault, brought against excise officers, who could not have an impartial trial there.

The Court were satisfied with this reason, and

Discharged the Rule.

Wigley in support of the rule.

Wednesday,
Jan. 25th.

Third persons cannot object to the misdirection of a *certiorari* to remove a cause from an inferior court, if the proper officers, in whose keeping the record was, waive the objection, and return the record upon such writ. Neither will the Court here quash such writ because the damages laid in the record below, which was an action for an assault against excise officers, were under 40s.

1792.

Thursday,
Jan. 26th.

It is sufficient to satisfy the provisions of the annuity act 17 Geo. 3. c. 26. to state the consideration of granting the annuity in the memorial by way of recital.

If several deeds be given to secure an annuity, and the consideration be expressed in all, the memorial need only state the consideration once.

If a bond, and a warrant of attorney to confess judgment, be given to secure an annuity, the warrant of attorney need not express the consideration, if the bond do.

HODGES *against* MONBY and BAILEY.

IN the last term the defendant *Money*, who had joined with *Bailey* in granting and securing an annuity to the plaintiff, obtained a rule for the plaintiff to shew cause why the judgment entered up on the bond and warrant of attorney given to secure the annuity should not be set aside, and why those and all other securities should not be given up to be cancelled, and all further proceedings staid. The matter, after argument, was directed to stand over till this term that the Court might be more fully apprized of all the circumstances: and now it appeared that the memorial of the annuity directed to be enrolled by the 17 Geo. 3. c. 26. set forth a bond in the penal sum of 600 *l.* to secure an annuity of 50 *l.* a year; a warrant of attorney to confess judgment thereon; and also an indenture between the parties, which is referred to in the bond, "whereby in consideration of the sum of 300 *l.* &c. to *Bailey* in hand paid by "*Hodges*" *H. Bailey* assigned to *Hodges* his half pay as a security &c; "On the back of which said indenture is a receipt under the "hand of the said *H. Bailey* for the sum of 300 *l.* being the consideration money paid to him by *Hodges* for the purchase of the said "annuity" Neither the bond or warrant of attorney as set forth in the memorial stated the consideration of granting the annuity; nor did the warrant of attorney itself, which was now produced in court, contain the consideration, but was in the usual form. The same objections, which were made to the grant of the annuity in the last term, were now renewed by

Erskine and *Gibbs*. 1st, There is no express substantive averment in the memorial that any consideration was paid for the grant of this annuity. The annuity act (a) requires "That a "memorial of every deed, bond, instrument, or other assurance, "whereby any annuity, &c, shall be granted &c, shall within "twenty days of the execution of such deed, bond, instrument, "or other assurance, be inrolled in the Court of Chancery; and "that every such memorial shall contain the day of the month "and the year when the deed, bond, instrument, or other "assurance, bears date &c; and shall set forth (*inter alia*) the "consideration or considerations of granting the same; otherwise "every such deed, bond, instrument, or other assurance, shall be

(a) 17 Geo. 3. c. 26. s. 1.

"null and void" &c. What is stated in the memorial as being on the back of the indenture is mere *recital*, and no direct averment of the fact of the 300*l.* being paid. *Non constat* but that such a receipt may be written on the back of the indenture, and yet the money may not have been paid. It should have been averred in the memorial that the consideration *was* paid. In *Robinson v. Howell* (a), where it was only stated by way of recital that in consideration of so much money paid to the grantor the annuity was granted, the Court held it insufficient. 2dly, The act requires that *every* deed &c, whereby the annuity is secured shall be set forth in the memorial, and *the consideration or considerations of granting the same*; otherwise *every such* deed &c, shall be void. Now the memorial does not state the consideration of the bond or warrant of attorney, but only of the indenture. It is no answer to say that it would be an useless repetition to state the consideration of every deed set forth in the memorial, which must be the same. It is sufficient that this is a matter of positive regulation expressly enjoined by the Legislature, who were abundantly cautious to prevent the frauds which had before been practised while these transactions were in secret. But 3dly, Supposing the first clause of the act should be satisfied by stating the consideration only once in the memorial, and not repeating it with respect to *every* instrument &c, yet at all events the consideration must be set forth in every instrument itself by the express requisition of the third clause; which, pursuing the words of the first section, enacts "That in every deed, instrument, or other assurance, whereby any annuity &c, shall be granted, the consideration really and *bonâ fide* paid, and also the names &c, shall be fully and truly set forth &c; and in case the same shall not be fully and truly set forth &c, *every such* deed, instrument, or other assurance, shall be null and void &c." Here the warrant of attorney produced does not contain the consideration for granting the annuity: and that was held by this court (b) to be an instrument for securing the annuity within the meaning of the act, which ought to be registered in the memorial; and if so, it is equally necessary by the third clause that it should contain the consideration.

Wood, contra, as to the first objection said that the words following the receipt of the 300*l.* "being the consideration money paid by the said *W. Hodges* for the purchase of the said an-

(a) *E. 31 Geo. 3. B. R. ante 494. n. b.*

(b) *Hopkins v. Waller, ante 463.*

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HODGES
against
MONEY.

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against
MONEY.

"nuity," were a sufficient averment that the money had been actually paid: It is the form in which averments in pleadings are often made. And as to the suggestion that it might be the mere recital of the words of the receipt on the back of the indenture, that was not so; the receipt concluded thus; "being the consideration money *within mentioned* to be paid by "him to me." In answer to the second objection, he said, that the first clause of the act only requires that *every memorial* should contain the consideration of granting the annuity, not that *every deed &c*, set forth in the memorial, should contain it. That would have been an useless tautology, and unnecessary for the purpose of the act, which was merely to ascertain what the consideration for granting the annuity was, that the Court might see that the grantor had not been imposed upon: and that end is as well answered by one averment of the consideration as by many. And so it was determined last term by the Court of Exchequer in *Oliver v. Style*. One of the objections there was that the consideration of the warrant of attorney was not stated in the memorial; to which the Court answered that a warrant of attorney to confess judgment does not contain upon the face of it any apparent consideration, but it was referred to by the indenture; and they were of opinion that they ought to couple the transaction and take the whole memorial together; and if the consideration appeared, that was sufficient. They added further, that a court of justice ought not to strain a remedial law for the purpose of injustice. As to the third objection that the warrant of attorney ought to have stated the consideration on the face of it; that never could have been the intention of the act; for then it would be equally necessary to state the consideration in the judgment, which is part of the assurance of the annuity: but that would be impossible. The true meaning of the Legislature was that the *assurance*, whether it consisted of one or more deeds or instruments, should contain the consideration; not that it should be stated as many times as there were deeds: several deeds for the same purpose make in law but one assurance.

The Court disposed of the first objection last term; being of opinion that the memorial contained a sufficient averment that the consideration was paid; though they agreed that, if it were merely stated by way of recital (a), that would be sufficient. And now

Lord KENYON, Ch. J. said, in answer to the second objection, that as the act of parliament only required that the memorial

(a) Vide *Sowerby v. Harris*, ante 494. S. P.

should contain *the consideration of granting the annuity*, it would be absurd to repeat the same thing several times in the same memorial, though several deeds were given to secure the same annuity, each of them expressing the consideration. That such a requisition would be deservedly subject to the objection of tautology; a complaint to which legal proceedings were already too much open. And that there was no foundation for the third objection, that the consideration ought to have appeared in the warrant of attorney; for that the bond, the warrant of attorney, and the judgment, taken together, only constituted one assurance; and that the act of parliament was satisfied by inserting the consideration in any part of this one assurance, namely, the bond. That if an assurance of an annuity consisted of a lease and release, or of a fine and other deeds, it could not be necessary to insert the consideration of the annuity in the lease for a year, or in the fine; but it would be sufficient if it appeared in the assurance, whether constituted of one or of several deeds.¹

Per Curiam,

Rule discharged.

DOULSON *against* MATTHEWS and Another.

Thursday.
Jan, 26th.

THIS was an action of trespass for entering the plaintiff's dwelling-house in *Canada*, and expelling him; there was another count for taking his goods: but as there was no proof to support the second count, the only question was whether an action of trespass could be brought in this country for the injury stated in the first count. Lord *Kenyon* at the trial was clearly of opinion that the cause of action stated in that count was local. And as the plaintiff could not support the second count, he was non-suited.

Trespass will not lie in this country for entering a house in *Canada*.

Erskine now moved to set aside that non-suit; observing that this was not an action to recover the land, but merely a personal action to recover a satisfaction in damages, which was transitory and might be tried here. In a case of a similar nature Lord *Mansfield* was of opinion that the action might be tried in this country. It was an action brought against Captain *Gambier*, for pulling down by order of Admiral *Boscawen* the houses of some sutlers upon the coasts of *Nova Scotia*, who supplied the sailors with spirituous liquors. In another case (a) Lord *Mansfield* himself mentioned this, and said "The objection was taken

(a) *Corup.* 180.

1792.

DOULSON
against
MATTHEWS.

"to the count for pulling down the houses; and the case of
 " *Skinner* and the *East India Company* (a) was cited in support
 " of the objection: On the other side they produced from a
 " manuscript note a case before Lord Ch. J. *Eyre*, where he
 " over-ruled the objection. And I over-ruled the objection upon
 " this principle, namely, that the reparation here was personal,
 " and for damages; and that otherwise there would be a failure
 " of justice; for it was upon the coast of *Nova Scotia*, where
 " there were no regular courts of judicature: but if there had
 " been, Captain *Gambier* might never go there again; and there-
 " fore the reason of locality in such an action in *England* did not
 " hold." But

Lord KENYON, Ch. J. said that the contrary had been held
 in a case in the Common Pleas; that where the action is on the
 realty, it is local.

BULLER, J. It is now too late for us to enquire whether it
 were wise or politic to make a distinction being transitory and
 local actions: it is sufficient for the courts that the law has set-
 tled the distinction, and that an action *quare clausum fregit* is
 local. We may try actions here, which are in their nature
 transitory, though arising out of a transaction abroad, but not
 such as are in their nature local.

Rule refused.

(a) *Cowp.* 167.Friday,
Jan. 27th.

NIBLET against SMITH.

Replevin for
 taking the
 plaintiff's
 goods and
 chattels, to
 wit, a lime
 kiln: avowry
 for rent; plea
 in bar that the
 lime kiln was
 affixed to the
 freehold.
 The Court
 held the plea
 in bar to be
 bad, because
 it was a de-
 parture from
 the declara-
 tion.

THIS was a replevin for taking the *goods and chattels*, to
 wit, one lime-kiln, &c, of the plaintiff; to which there
 was an avowry for rent in arrear. The plaintiff, in his plea in
 bar, said that the *lime kiln* before and at the said time when &c,
was affixed to the freehold of the piece or parcel of ground on
 which &c, and as such was by law exempt from any distress
 for the arrears of rent in the avowry mentioned, and ought
 not to have been distrained for the same, &c. To this plea the
 defendant demurred generally.

Holroyd in support of the demurrer. The plea in bar is bad
 on two grounds; First, it is inconsistent with, and is a departure
 from, the declaration, by stating the lime kiln to be affixed to
 the freehold, when the declaration had alleged it to be a chattel.
 Secondly, the lime kiln being affixed to the freehold, no replevin
 will lie for it; for if the defendant should succeed, it could not

be delivered to him under the writ of *retorno habendo*. In *Co. Lit.* 145. *b.* it is said that a replevin lies for goods and chattels only. And a lime kiln is as much affixed to the freehold as doors, windows, or a furnace, which are always considered as belonging to the freehold. *Bro. Abr.* "Chattels" *pl.* 7.

Smith contra. For the reasons already given by the defendant's counsel, this lime kiln must be taken to be affixed to, and part of, the freehold, and was not therefore liable to be taken as a distress.

The Court were of opinion that the plea in bar could not be supported, because it was a departure from the declaration. That the declaration, treating the lime kiln as a chattel, might possibly have been true, because lime may be burnt in a portable oven, and the kiln need not therefore necessarily be affixed to the freehold: but that, as the plea in bar stated it to be affixed to the freehold, it was inconsistent with the declaration.

Judgment for the defendant.

BENGOUGH and Another *against* ROSSITER.

Friday,
Jan. 27th.

DEBT on bond. The defendant, after craving oyer of the bond, by which he and two others became jointly and severally bound to the plaintiffs as *sheriffs of Bristol*; and of the condition, which was for the defendant to appear before the mayor and aldermen of *Bristol*, justices assigned to keep the peace &c, at the next general quarter sessions to be holden &c, in the *Guildhall* in the said city, on &c, to answer &c, touching a certain trespass and assault whereof he was indicted, pleaded, that before and at the time of making the said writing obligatory he had been indicted for the trespass and assault in the condition mentioned, and that a *capias* was issued out of the court of sessions of *Bristol*, directed to the then sheriffs of *Bristol*, commanding them to take the said defendant, and him safely keep, so that they might have his body before the said justices in the condition mentioned at the next general quarter sessions &c, then and there to answer &c. The plea then stated the delivery of the writ to the plaintiffs as sheriffs, and the arrest of the defendant by virtue thereof, and that the defendant executed the said bond with the said condition *in order to obtain his discharge* from out of the custody of the plaintiffs, who thereupon set him at liberty; *the said indictment in the said*

The sheriff has no authority to take a bond for the appearance of persons arrested by him under process issuing upon an indictment at the quarter sessions for a misdemeanor: he can only take a *recognizance* for their appearance.

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*condition of the said writing obligatory mentioned then being pending and wholly undetermined; and that the defendant did not upon or at any time before or after the making of the said writing obligatory, or before the exhibiting of the plaintiff's bill, enter into any recognizance or other security whatsoever to our lord the now king for his appearance at the said sessions, in the condition of the said writing obligatory mentioned, or at any other court or sessions whatsoever, to answer the said indictment &c, or in any other manner whatsoever touching the said trespass &c, nor was any such recognizance or security entered into or given to our said lord the king in that behalf. The second plea was the same as the former, except that it stated that the defendant while in custody upon the arrest executed the bond in order to obtain, and in consideration of then and there obtaining, his discharge out of custody; which bond the plaintiffs accepted on the occasion and for the cause and consideration aforesaid, and thereupon then and there set at liberty and permitted the defendant to escape and go at large &c; the said indictment being then pending and wholly undetermined, &c. The third plea was also the same as the first as far as the averment of the plaintiff's having set the defendant at liberty after having executed the bond in order to obtain his discharge; and then was added this further averment, that no writ of *venire facias* issued or was sued out against the defendant upon the said indictment mentioned &c, previous to the issuing of the said writ of *capias* against the defendant; nor was he thereby or by any other writ or process whatsoever summoned to appear or answer to the said indictment before the issuing of such writ of *capias*.*

To each of these pleas there was a general demurrer, and joinder.

Marryat, in support of the demurrer, made two points; 1st. that the sheriffs were justified in executing the *capias*, although no *venire* had previously issued; and secondly that the sheriffs, having arrested the defendant under the sessions' process, were not only justified but bound to take an *obligation* for his appearance at the return of the writ. But he was desired by the Court to confine himself to the last point, as they had not any doubt upon the first. And this he said depended on the stat. 23 *Hen. 6. c. 9.*; by which sheriffs are enjoined "to let out of prison all persons by them arrested, or being in their custody, by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties, &c, where such

“such persons be so let to keep their days *in such place as the said writ, bill, or warrant shall require*” &c. And “that no sheriff, &c, shall take &c, any obligation for any cause aforesaid, or by colour of their office, *but only to themselves* of any person, which shall be in their ward by the course of the law, *but by the name of their office*, and upon condition written that the prisoners shall appear at the day contained in the said writ, bill, or warrant, and in such places as the said writ, bill, or warrant, shall require; and if any of the said sheriffs &c, take any obligation *in other form* by colour of their offices, that it shall be void.” It will be contended that this statute only relates to bail upon indictments taken in the sheriff’s own court, the torn: but it is evident that the words “*in such place as the said writ, bill, or warrant*” must refer to other courts besides his own. Nor was it necessary to pass any statute for the purpose of enabling the sheriff to bail persons indicted in his own court; for he, as sole judge thereof, had a clear right to do so before the statute. It is a settled principle that where a person has a power to judge (except in the case of felonies) he has, at common law, a power to bail also. A writ of mainprize lay at common law. *Fitz. N. B.* 249, 250. And in 250. G. it is said “If a man be indicted before justices of peace of trespass, and imprisoned for the same by process, he may sue a writ out of the Chancery, directed to the sheriff to take bail of him to appear before the justices at the sessions, and to set him at liberty.” The only reason therefore for passing this statute was to extend the power of the sheriff to the bailing of persons indicted before justices of peace, whose jurisdiction was not settled before the 1 *Ed.* 3. and augmented by subsequent statutes, in like manner, as he exercised that power at common law over persons indicted in his own court. Then supposing the sheriff had power to liberate out of custody in this case, he could only do it by taking a bail bond, and not by taking a recognizance. For no person can take a recognizance who is not a judge of record or by commission. Besides which, this very statute of *Hen.* 6. requires expressly that it shall be done by *obligation* only, taken by the sheriff by his name of office; and prohibits security from being taken in any other way. That this was the practice appears from *Dall. Rep.* 11. and 7 *Ed.* 4, 5. *b.* *pl.* 15. (recognized in *Plowd.* 68. and 10 *Co.* 108. *b.*) where the defendant in custody of the sheriff by a *capias* on an indictment of trespass was bailed on giving a bond

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to a stranger to appear at the day &c; and there the bond was held void, not because it was a bond, but because it was not made to the sheriff as the statute directs.

BULLER, J. Whatever power the sheriff might have had in this respect under the statute 23 Hen. 6. c. 9., the question is, whether it is not taken away by a subsequent act passed in the next reign; 1 Ed. 4. c. 2. It is clear that at common law the sheriff could not bail any persons indicted before justices of the peace (a), though he might bail those indicted before him at his torn (b). Now the stat. 23 Hen. 6. was not passed to enable the sheriff to take bail in cases where he could not bail before, but in order to compel him to take bail in those cases where he might have taken bail, and neglected so to do. Before this statute the sheriff might bail those indicted before him: but the stat. 1 Ed. 4. c. 2. manifestly shews that the Legislature would not trust to the sheriff in such cases; for the act requires him to return all indictments taken before him at his torn to the justices at the next sessions; and *Hawkins* (c) expressly says that that statute takes away the sheriff's power of bailing in such cases. In the 25th section of the same chapter he says "it is holden by some that by the common law the sheriff might, by virtue of his office, as principal conservator of the peace, bail any person arrested on suspicion of felony, or for any other offence which is bailable. In the next clause (d), he says "But it seems that the sheriff had no power, *ex officio*, to bail any person indicted of any crime before justices of peace." And in the 27th, "It is holden that at this day the sheriff has lost his power by reason of 1 Ed. 4. c. 2.; by which it is enacted "that the sheriff shall not proceed on any such indictment, but shall remove it to the next sessions of the peace." Therefore there was a case before the statute of Hen. 6., in which he might have taken bail.

The Court (stopping *Lawes*, who was to have argued on the other side) then said that these passages in *Hawkins* perfectly explained the meaning of the statute Hen. 6.; and were confirmed by the ordinary course of justice which was conformable to his opinion; and that it was the sheriff's duty to have taken a recognizance.

Judgment for the defendant.

(a) 2 Hawk. P. C. c. 15. s. 26. (b) *Ib.* s. 27. (c) *Ib.* s. 27. (d) 3cB. 26.

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GAMON *against* JONES and Another. In Error.Tuesday,
Jan. 31st.

TO a replevin the defendant *Jones* avowed, and the other defendant made cognizance, for taking the distress for rent in arrear; the plaintiff in his plea in bar said nothing was in arrear; on which issue was joined. The jury at the great sessions at *Glamorgan* found the issue for the defendants, and assessed their damages at 19 *l.* together with 4 *s.* costs: and the judgment was "that the plaintiff be in mercy &c; that the defendants go without day; that they have a return of the cattle &c; and that they recover their damages and costs aforesaid assessed by the jury in manner above, and also 46 *l.* 13 *s.* 5 *d.* $\frac{1}{2}$ for their damages and costs awarded by the Court to the defendants by their assent by way of increase; which damages, expences, and costs, amount in the whole to 65 *l.* 13 *s.* 5 *d.* $\frac{1}{2}$." The plaintiff removed the record into this court by a writ of error, and assigned for error, "that the judgment was given for damages distinct from the costs and charges of the defendants, and also for a return of the cattle; and that in the judgment there is no award that the plaintiff take nothing by his writ or plaint, or that the defendants hold the said cattle irreplevisable, &c."

A judgment in replevin "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury," &c, is good either as a judgment at common law, though the return be not adjudged *irreplevisable*, or as a judgment under the 21 *H.* 8. c. 19. which entitles the defendants to damages and costs.

Bevan, for the plaintiff, contended that the judgment was erroneous, whether it were considered as a judgment at common law, or under the statute 17 *Car.* 2. c. 7. 1st. It is bad as a common law judgment, because it does not adjudge a return of the cattle *irreplevisable*. Secondly, The value of the cattle not being found by the jury, it is bad as a judgment under the statute 17 *Car.* 2. c. 7. s. 2. which directs that the jury shall enquire concerning the arrears of rent, and the value of the goods distrained.

Wood contra. If the errors be material, the Court may give the proper judgment themselves, if the record will warrant them in doing so. *Salk.* 401. Now it clearly appears on the record that the avowant is entitled to a judgment of a return of the cattle irreplevisable, and therefore the Court will be warranted in giving that judgment. But it will not be found that the judgment given below is erroneous. By the common law, when the merits of a cause were decided by a verdict in replevin, the judgment was for a return of the distress irreplevisable: but when the plaintiff was nonsuited, the return was replevisable.

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But it being found highly inconvenient that the plaintiff might have several replevins for the same cause, the statute of *Westminster 2. (a)* was passed to remedy the inconvenience; and it enacts that where the plaintiff is nonsuited, he shall not have a new replevin, but a writ of second deliverance; and if he be nonsuited a second time, the return shall be irreplevifable. Since that statute, therefore, whenever the defendant succeeds in replevin, the return of the distress must be necessarily irreplevifable in all cases; and perhaps it is on this account that the addition in the judgment, of the return being irreplevifable, has been disregarded since the statute; the distinction between the two cases being destroyed by that act.

LORD KENYON, Ch. J. It is sufficient for the defendant's purpose to establish this as a good judgment at common law, even though the former part of the judgment cannot be supported under the statute of *Car. 2.*, because the value of the distress is not found. The single question is, therefore, whether this be not a good common law judgment, although it do not in terms award a return irreplevifable. In *Townsend's Judgment (b)* are several precedents of judgments, awarding a return of the distress without adding "irreplevifable:" and the observations by the defendant's counsel shew that the addition is not necessary since the statute; because now in point of law the return is irreplevifable in all cases.

BULLER, J. (c) It not being stated what was the rent in arrear, this cannot be supported as a judgment under the statute of *Car. 2.* which requires that the amount of the rent and the value of the goods shall be found. But this may be taken to be a good judgment under the statute 21 *Hen. 8. c. 19. s. 3.* under which the defendants are entitled to damages and costs. Neither is there any foundation for the other objection, that this is an erroneous judgment at common law, for the reasons already given. Besides, it is an invariable rule that if a judgment be more favourable for the plaintiff than he is entitled to, he cannot take advantage of it, because he is not injured by it.

GROSE, J. Of the same opinion.

Judgment affirmed.

(a) 13 *Ed. 1. s. 1. c. 2. s. 3.*

(b) Page 206, 7.

(c) *Kb. Ashurst, J.*

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Tuesday,
Jan. 31st.SAPSFORD *against* FLETCHER.

REPLEVIN for taking goods in the plaintiff's dwelling house. Avowry for 50*l.* rent due at *Christmas* 1790 from *Brookes* to *Fletcher's* testator for this house; another avowry for the same rent due at the same time from the plaintiff to the defendant's testator. Pleas in bar, first, as to 20*l.* (parcel of the 50*l.*) nothing in arrear; 2dly, as to 30*l.* the residue, a tender and no subsequent demand; 3dly, "that *William Fletcher* (deceased) in his life-time and at the time of his death, and the said *William Fletcher* (the defendant) from the time of his death until and at the said time when *Ec*, held the said dwelling house in which *Ec*, with the appurtenances as tenants thereof to the Duke of *Portland*, at and under the yearly rent of 5*l.* of lawful money of *Great Britain* to be paid at the four most usual feasts or days of payment of rent in the year, that is to say, *Ec*, by even and equal portions. And that before the said time when *Ec*, 20*l.* of the said last mentioned rent for four years, ending at the feast of the Nativity of our Lord *Christ* 1790, became due and in arrear from the said *William Fletcher* (the defendant) to the said Duke. And thereupon the said Duke, at the said feast of *Ec*, demanded payment of the arrears of the said rent from the said *W. Fletcher*, (the defendant,) but the said *W. Fletcher* then and there refused to pay the same; whereupon the said Duke afterwards, and before the said time when *Ec*, demanded the payment of the said arrears of rent from the said *W. Brookes*, as the occupier of the said dwelling house, and threatened to distrain upon the goods and chattels in and upon the said dwelling house and premises; whereupon the said *W. Brookes* in order to prevent the said goods and chattels in and upon the said dwelling house and premises from being distrained, long before the said time when *Ec*, to wit, on the 25th day *December* 1790, paid to the said Duke the said 20*l.*, the rent aforesaid, so being in arrear and unpaid as aforesaid; and so the plaintiff, says that nothing of the said 20*l.* of the rent aforesaid was in arrear to the said *W. Fletcher* (the defendant), in manner and form as the said *W. Fletcher* (the defendant) hath above in his said avowry alleged: and this the plaintiff, *Ec*, wherefore *Ec*." A similar plea to the last avowry.

To both these there was a general demurrer.

To an avowry for rent the tenant may plead payment of a ground rent to the original landlord.

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Chambre, in support of the demurrer, urged that the plea in bar was no answer to the avowry; for though it was not pleaded in form as a set-off, it was so in effect; and it has been held that the statutes of set-off do not extend to a replevin, *Abfolom v. Knight* (a). Neither can the payment of a debt of the avowant be considered as payment of rent, so as to prove the plea that nothing is in arrear. The plaintiff, having stated the special grounds from which he draws the conclusion that nothing is in arrear, cannot be permitted to resort to other grounds to support it. Now the circumstances here pleaded at the most only amount to this, that the avowant has contracted a debt with him; for the relation in which he stands to the plaintiff cannot vary the case. It does not appear that the avowant had any notice that the plaintiff had paid the ground-rent; and no person can be allowed to charge another with a debt against his consent or without his knowledge. This therefore cannot be considered as a payment for the avowant, because the plaintiff was not authorised to make it. But even if it had been paid with the avowant's consent, and he had afterwards repaid the plaintiff, the former might have avowed for the whole rent in arrear, and yet if it could have been considered as part payment of the rent by the tenant at first, the defendant could not afterwards have avowed for that part of the rent; and it is not alleged in the plea that the defendant has not repaid him. In all the land-tax acts a special provision is made to enable the tenant to deduct the land-tax, which is a charge upon the land, out of the rent to be paid to the landlord: this furnishes a strong argument to shew that in the contemplation of the Legislature paying the land-tax by the tenant would not have been considered as part payment of the rent to the lessor, otherwise it would have been nugatory to have inserted this clause in those acts.

Lord KENYON, Ch. J. It is incumbent on a party, who wishes to establish a point contrary to all justice and equity, to produce some direct authority, shewing that there is an inflexible rule of law established in opposition to justice: but no such authority has been produced by the defendant to support his claim. The general principles that have been relied on in the argument, that a set-off cannot be pleaded to an avowry for rent, and that no person can make another his debtor by voluntarily paying the debt of that other person

(a) *Barnes* 450. 4to. edition, and *Bull.* | *B. R. and Laycock v. Tuffnell*, E. 27 G. 3.
N. P. 181. *Graham v. Fraine*, H. 24 G. 2. | *B. R. S. P.*

against

against his consent, are not questioned. With regard to the first, it is much to be lamented that it should have been so decided: however, for the sake of certainty in the law, we must submit to those decisions, till the Legislature alter the law. But this is not a cross demand: the ground rent paid by the plaintiff was in discharge of a demand superior to the improved rent; it was the first charge from which the defendant was to exonerate himself before he put any of the rent due from the plaintiff into his own pocket. This was a payment in respect of the occupation. And to the other position I perfectly subscribe; but it cannot govern this case. Here the plaintiff was sub-tenant to an estate of the defendant's, held under the Duke of *Portland*; the ground-rent being in arrear, the Duke of *Portland's* agents applied to the plaintiff for payment, which they had it in their power to enforce by distress; and they even threatened to do so; it was therefore *by compulsion* that the plaintiff paid this money, which was due in respect of the very property which he held as tenant to the defendant, and of the same property for which this distress was made. This then is clearly distinguishable from the case of a *voluntary payment* made to charge another person with a debt against his consent. And now the defendant insists that, though all this property was liable to the ground-rent, and though this was the first charge on the land, he is to receive the whole of the reserved rent from the plaintiff, without making any deduction for the ground-rent. But a more unconscientious proposition was never stated in a court of justice.

BULLER, J (a). There is a great difference between a payment and a set-off; the former may be pleaded to an avowry, though the latter cannot. That is a good payment which is paid as part of the rent itself in respect of the land: but a set-off supposes a different demand, arising in a different right. A case put at the bar admits of a decisive answer; it was said that if the tenant had paid the ground-rent, and the defendant had afterwards repaid him, the latter could not avow for the whole rent; but, whether the payment of a sum of money is to be considered as a payment by one person for the debt of another must depend on the will and consent of both parties; and if it be once considered by both as payment, the debt cannot afterwards be revived. And my answer to the case supposed is this, that the payment there never was considered by both as a pay-

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ment; and, if not, the whole rent remains due. I consider this case as a lease by the defendant to the plaintiff at the annual rent of 50*l.*; out of which 5*l.* *per annum* was to be paid to the ground-landlord; and therefore a payment of that ground-rent is a payment of so much rent to the defendant, and may be pleaded in answer to the avowry for rent. Neither can we suppose upon this record that the defendant ever repaid the plaintiff this ground-rent; for, if he had, he might have replied that fact.

GROSE, J. The principles relied on by the defendant's counsel are not disputed, but they are not applicable to this case. It must be admitted that a plaintiff cannot plead a set-off to an avowry for rent, and that one person cannot make another his debtor by a voluntary payment. But this is neither the one or the other. It is a compulsory payment made by the plaintiff to protect him from a distress for the ground-rent due to the original landlord.

Judgment for the plaintiff.

BARRY *against* PEBBINGTON.Tuesday,
Jan. 31st.

Whether the right to the soil is in issue, entries written by the steward of a former owner from whom title is derived are admissible evidence, if the steward be dead.

THIS was an action of trespass, wherein the issue was on the soil and freehold of the defendant. At the trial at *Chester* the plaintiff, who derived title under Lord *Barrymore*, offered in evidence several *items* contained in a book in the hand-writing of one *Asbley*, who had many years ago been steward to Lord *Barrymore*, and was now dead. The manuscript was a common day-book, not particularly appropriated to *Asbley's* concerns with Lord *Barrymore*, but containing a variety of other matters relating to his different employers; and the *items* in question, three in number, were *memoranda* of receipts of sums of money by *Asbley* from different persons by name, but whose situations were not mentioned, for trespasses committed on the common in question, paid on account of Lord *Barrymore*; the first *item* was dated in 1739, the last in 1785. This evidence was rejected; and a verdict having been given for the defendant, a rule was obtained in the last term calling on him to shew cause why there should not be a new trial, on the authority of *Warren v. Grenville* (a).

Leycester, Topping, and Abbott, now shewed cause; contending that this evidence was properly rejected, whether the question

(a) 2 Str. 1129. Vide 2 Burr. 1072.

were considered on the general rules of evidence, or on the authorities forming exceptions to that rule. As to the first, it was *res inter alios acta*, and it was the evidence of a person not on oath, and whom the adverse party had no opportunity of cross examining. The acts, which were the subject of these entries, were supposed acts of trespass, for which a satisfaction was supposed to be made: but in such cases much depends on the situations of the persons making the satisfaction, whether poor or affluent, and on the circumstances attending the transaction; now these were simple entries, without any explanation whatever. Perhaps too the persons, who paid these sums, were tenants of Lord *Barrymore*, living within *Wareham* manor, and consequently entitled to a right of common there, though they were not inclined to contest any point with the lord of the manor: if they were not, but were tenants of *Harford* manor, that fact should have been supplied by affidavit. Neither does this case come within the usual exception of a steward's book being evidence, or within the case of *Warren v. Grenville*. The former exception only obtains where the account has been settled with the lord, or signed by the steward: but this book was not signed by the steward, nor does it appear that it was ever produced to the lord. Besides the foundation of that exception is that, as the steward charges himself by such an account, it shall be evidence against him: but that ought not to bind third persons who are not parties to the transaction. And in the case cited, where the question was whether a surrender by a tenant for life should be presumed to support a recovery of 40 years standing, the debt-book of an attorney, who was employed in suffering the recovery, containing two articles charged for drawing and engrossing the surrender, was admitted in evidence, to fortify the presumption, and because, as in case the attorney had been living he might have been examined, that book was the next best evidence. But in this case the entries fortify nothing; and they were not the next best evidence, because it was not proved that the persons who had made satisfaction for the supposed trespasses were dead. Besides this case is merely an exception, and ought not to be extended so as to establish a general rule.

Lord KENYON, Ch. J. (Stopping the counsel on the other side). We are not now called upon to determine what weight this evidence ought to have in this cause; and perhaps it may turn out on farther investigation that these were small sums of money, and paid by persons in poor circumstances to the lord of
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the manor, with whom they were not in a situation to contend: but the single question here is whether these entries be not admissible evidence. It is clear that where a steward charges himself with the receipt of money, it shall be received in evidence before a jury to shew that such sum was received by him. But it has been objected that the steward's accounts should have been signed by him: if the entry be not in the hand-writing of the steward, undoubtedly it must be signed by him: but here all these entries were written by the steward himself, and therefore they were evidence to charge him with the receipt of the money; and if so, they should have been received in evidence on the trial of this cause, though probably they may not have much weight before the jury.

ASHHURST, J. The rule is that if a steward's entry be sufficient to charge him, it is admissible evidence; and these entries were undoubtedly sufficient to charge him. Suppose Lord Barrymore had brought an action against the steward for money had and received, he might have given him notice to produce the books in which these entries were made, and they would have charged the steward with the receipt of these sums.

BULLER, and GROSE, Justices, agreeing,

The rule was made absolute.

Friday,
Feb. 3d.

PERRY and Others against JACKSON Bart. and Others.

If one plaintiff be abroad and the others in England, the action must be brought within six years after the cause of action arises.

THIS was an action on a bill of exchange for 100*l.* by the payees against the drawers. The declaration stated that the defendants on the 24th of November 1767, at *New York* in parts beyond the seas, to wit, at *London*, &c, drew the bill in question, requesting *R. Willis* to pay at 40 days sight the contents to the plaintiffs; that *Willis* in January 1768 refused to accept, and afterwards to pay it; by reason whereof, and according to the usage and custom of merchants the defendants became liable to pay &c. The defendants pleaded severally the statute of limitations: to which the plaintiffs replied that when the cause of action accrued to the plaintiffs, one of them was abroad in parts beyond the seas and out of the kingdom of *Great Britain*, to wit, at *New York* in *America*; and that he remained so abroad in parts beyond the seas continually from thence until October 1787, when he returned &c; averring that they exhibited their bill within

within six years after his return. The defendants demurred generally to these replications.

Baldwin and Adam (a) in support of the demurrers. By the 21. Jac. I. c. 16. §. 3. the time of bringing actions upon the case is limited to six years after the cause of action arises; provided (sect. 7.) "That if any person or persons, that is or shall be entitled to any such action upon the case &c, be or shall be at the time of any such cause of action within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, then such person or persons shall be at liberty to bring the same action, so as they take the same within such times as are before limited after their coming to or being of full age, *discovert*, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done." There being no case upon this subject, the question must depend on the reason of the exception made in the above proviso. The exception was introduced for the purpose of protecting the interests of those, who were not competent to enforce their demands in a court of justice; and the reason of it only holds in the case of a single plaintiff residing abroad; for when there are several plaintiffs, and one of them resides in this country, he may do every act to bind his partners, which they themselves might have done if they were all present: he may sue, or contract, or release a debt, and therefore in such cases the ground of exception fails. If a contrary construction were to prevail, the plaintiffs would have the benefit of being both at home and abroad; the former, for the purpose of contracting, suing, or releasing; the latter, for that of avoiding the statute of limitations. The Legislature did not intend to give an option to plaintiffs either to sue within the time limited or not, as they pleased: they meant to enlarge the time in favour of those who were under a temporary incapacity to sue, and not in favor of those who *could* sue at the time. Where several persons are debtors, it has been held (b) that the acknowledgment by one is sufficient to take the case of all out of the statute of limitations: then when they are creditors, the same rule ought to prevail, and the ability of one to sue for all ought to take such case out of the proviso. The inconvenience too of a contrary determination ought to have great weight in putting the first construction on this part of the statute. It frequently happens that in great

(a) The defendants defended separately on the record.

(b) *Whitcomb v. Whiting*, Dougl. 652. 3d edit.

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commercial houses one partner resides abroad; and if that circumstance alone were sufficient to bring a case within the proviso of this act, it would in a great measure defeat the provisions of the statute. Or suppose a release had been given by one of these plaintiffs, which would have bound all the rest, and the defendants after keeping it for six years had destroyed it, it would be hard upon them that they should be afterwards sued for the same cause of action, when the statute of limitations had induced them to destroy their only evidence of defence against such a demand.

Wood contra. The argument for the defendants proceeds on a supposition that the plaintiffs who were resident in this country might have sued: but they could not sue without the consent of the other. The action must necessarily be brought in the names of all, who must give a joint power of attorney to sue; and therefore it is equally necessary that all should be free from any of the disabilities mentioned in the proviso. By the old law it was necessary in all actions both real and personal that both parties should attend the Court (a); and to remedy this inconvenience in certain actions the stat. *Westm. 1. c. 42.* (b) enabled them to appoint attornies to act for them after they had appeared in person. If the old law had still continued, one of these plaintiffs would have been under an absolute disability to sue. In real actions, and actions which favour of the realty, summons and sequestration are allowed, but not in personal actions. Suppose the partner, who was abroad, had been an infant, the other plaintiffs must have waited till he attained his age of twenty-one; then the same rule ought to apply to this case. Nor will a decision that the plaintiffs are within the proviso of the stat. *Jac. 1.* be attended with any injustice; for the bill of exchange, the subject of the present action, was drawn abroad; the circumstances under which it was drawn were probably better known to the partner at *New York* than to those in *England*; he therefore was the best judge whether the action should or should not be commenced.

Lord KENYON, Ch. J. It is rather singular that this is the first time that this question has been brought into a Court of law, though the circumstance, upon which the question arises, must have frequently occurred. It being admitted that there is no decided case on this point, it must depend on the reasonable construction to be put upon this act of parliament. The

(a) 2 Inst. 249.

(b) 3 Ed. 1. c. 42.

proviso on which the question arises was introduced into this statute in order to protect the interests of those persons which there was no one of competent age, of competent understanding, or competent in point of residence in this country, to protect. Now two of the plaintiffs in this cause have always been resident here: and it was their duty to watch over those interests in which they themselves were equally concerned with the partner who resided abroad. It is admitted that one partner may do several acts to bind the interests of all; he may release as well as create a debt; he may also by his acknowledgment take a case out of the statute of Limitations; and I see no reason why the same rule should not hold also in the present instance. The third section of this act of parliament limits the time of bringing actions on the case in all cases to six years after the cause of action accrues; the plaintiffs therefore were bound to commence their action at an earlier period, unless they come within the exception in the last clause of the act, by which it is enacted "that if any *person or persons* entitled to such actions &c be beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they take the same within such time as before limited after their return from beyond the seas as other persons having no such impediment might have done." Now the words of this clause, grammatically speaking, do not apply to the present case: they only extend to cases where the person individually, a single plaintiff, or *persons*, in the plural, when there are several plaintiffs, are not in a situation to protect their interests. Neither does this case come within the policy of the law which provides that, if parties neglect their interests for such a length of time as six years, they shall lose the benefit of suing to enforce their demands. I am therefore clearly of opinion, both on the words of the act of parliament, and on grounds of policy, that the plaintiffs are barred by the statute of *James*.

ASHHURST, J. The plaintiffs are not now entitled to recover on this bill of exchange, whether their case be considered on the words of the statute, or on the reason of the thing. The plaintiffs do not come within the words of the proviso, as my Lord has already observed: and this statute having been always considered as a beneficial law for the public, we ought not to extend the exceptions in it to a case which does not require it. It was competent to the plaintiffs, who resided in *England*, to bring the action, as well as to release it. And in construing ano-

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ther act of parliament (a), which requires ten days notice of trial where the defendant resides above 40 miles from London; we have determined that if one of the defendants reside within that distance, so long a notice is not necessary.

BULLER, J. declared himself of the same opinion.

GROSE, J. absent.

Postea to the defendants.

(a) 14 Geo. 2. c. 17. s. 3.

Friday,
Feb. 3d.

DOUGHTY against LASCELLES.

When a declaration is delivered before the Essoign day of a term, with a rule to plead in the four first days of that term, the defendant cannot plead within that time in abatement without a special imparlance.

THE declaration was delivered, as of *Trinity* term, before the Essoign day of *Michaelmas* term, with notice to plead within the four first days of the latter term; within which time the defendant filed this plea; "And *Lascelles Lascelles*, who is sued by the name of *Sturdy Lascelles*, in his proper person comes and pleads that he was baptized by the name of *Lascelles &c.*, without this that he was ever called or known by the name of *Sturdy &c.*" The plaintiff, considering this plea in abatement as delivered out of time, signed judgment; in order to set aside which a rule was obtained, on the authority of *Brewster v. Capper*, 1 *Wils.* 261. and 1 *Bl. Rep.* 51.

Russell now shewed cause against this rule; saying that *Brewster* and *Capper* was determined on the authority of *Keilw.* 93. b., which did not warrant it. But, even if it did, there is a later case, cited in *Jennings v. Webb* (a), in which it was held that when a defendant has the four first days of a term, subsequent to that in which the declaration is delivered, to plead, he must plead in abatement within the first four days *as of the precedent term*. But this plea is neither pleaded as of the preceding term or after a special imparlance; and therefore the plaintiff was entitled to sign his judgment.

Holroyd, in support of the rule, relied on *Brewster v. Capper*, as deciding this identical point. There the defendant pleaded in terms precisely similar to the present, which the Court said was a special imparlance for this purpose; though they added that if the defendant had pleaded "the *aforesaid J. C. &c.*" it would have been bad, for that would have confessed that *J. C.* was the true name. And upon the same distinction was the case put in *Keilw.* 93. b. But even, if the defendant were wrong, the plaintiff should have demurred, as was done in *Brewster v. Capper*, and not signed judgment.

(a) *Ante*, 1 vol. 278.

Sed per Curiam. Such a plea as this can only be received after a special imparlance, which should be stated on the record: but that not appearing here, the plaintiff was entitled to sign judgment.

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DOUGHTY
against
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Rule discharged.

The KING against JOHN, JAMES, and JOSEPH,
YANDELL.

Saturday,
Feb. 4th.

THIS was a writ of error to reverse a judgment of outlawry.

The record began with stating the commission under which the justices of oyer and terminer &c sat in *Somersetshire*, before whom an indictment was found against the prisoners *John* and *James Yandell*, as principals for sheep-stealing, and the prisoner *Joseph* as an accessory after the fact, which indictment was in the common form, and was set forth at length. The record proceeded as follows;

"Which said indictment the said justices aforesaid, to wit, at the delivery of the gaol of our said lord the king of the said county of *Somerset*, holden at the Castle of *Taunton* aforesaid, in and for the said county of *Somerset*, on the said *Thursday* the twenty-seventh day of *March* in the said twenty-eighth year of the reign of our said lord the king before the justices of our said lord the king above named, and others their fellows, justices of our said lord the king, assigned to deliver his said gaol of the county of *Somerset* aforesaid of the prisoners therein being, by their proper hands do deliver here in court of record in form of law to be determined &c. Whereupon at the same

In a record of outlawry it appeared by the writ of proclamation and the return to it that the prisoners were required to render themselves to the sheriff, so that he might have their bodies before the justices &c. at the return of the writ; and held good. If one exigent be awarded against the principal and accessory together, it is error only as to the accessory. The statute of 25 Ed. 3.

§. 5. c. 14. does not apply to a court of oyer and terminer, and gaol delivery. If it appear on the record that the writ of proclamation was delivered to the sheriff three months before the return of it, it is sufficient, though it be not so expressly alleged.

The writ of proclamation required the sheriff to proclaim the parties in open court in the sheriff's county, (not saying county court;) and held good.

The sheriff need not allege in his return to the writ of proclamation that "the persons proclaimed did not appear, and render themselves;" though he must in his return to the exigent.

The names of the coroners need not be subscribed to the judgment of outlawry: if it appear on the record that the judgment of outlawry was given by them, it is sufficient.

It need not appear on a record of outlawry that the capias and exigent were sealed by the justices of oyer and terminer, &c.

If it be stated that the justices of our lord the king were assigned by letters patent under his seal of Great Britain, it will be presumed to be the great seal.

A person outlawed on an indictment for sheep-stealing is ousted of clergy by the 14 Geo. 2. c. 6. §. 1.; "outlawry" being a "conviction" within the meaning of that statute.

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The KING
against
YANDELL.

Capias issued.

Returnable
at the next
assizes.

Session of oyer and terminer and gaol delivery of our said lord the king, holden at the Castle at *Taunton* aforesaid, in and for the said county of *Somerset*, on the said *Thursday* the said twenty-seventh day of *March* in the said twenty-eighth year of the reign of our said lord the king before the same justices and others their fellows aforesaid, the sheriff of the said county of *Somerset* by a writ of our said lord the king is commanded that he do not omit, by reason of any liberty in his county, but that he take the said *John Yandell*, *James Yandell*, and *Joseph Yandell*, if they shall be found in his bailiwick, and them safely keep, so that he have their bodies before the justices of our said lord the king at the next assizes and general gaol delivery to be held for the said county to answer our said lord the king for the said felonies, whereof they stand indicted; at which said next assizes and general gaol delivery (to wit) at the assizes and general session of oyer and terminer and general gaol delivery of our lord the king, holden at the City of *Wells* in and for the county of *Somerset* on *Monday* the twenty-eighth day of *July* in the twenty-eighth year of the reign of our sovereign lord *George* the Third, King of *Great Britain* &c, before the right honorable Sir *James Eyre* knight, lord chief baron of his majesty's court of Exchequer, *Francis Buller*, esquire, one of the justices of our said lord the king, assigned to hold pleas before the king himself, and others their fellows, justices of our said lord the king, assigned by letters patent of our said lord the king under his great seal of *Great Britain*, to the said Sir *James Eyre*, *Francis Buller* and others their fellows, justices of our said lord the king, and to any two or more of them, directed, (of whom one of them the said Sir *James Eyre* and *Francis Buller*, amongst others, in the said letters patent named, our said lord the king willed to be one) to inquire more fully the truth by the oath of good and lawful men of the county aforesaid, and by other ways means and methods, by which they should or might better know, (as well within liberties as without) by whom the truth of the matter might be the better known and enquired into, of all treasons, misprisions of treason, insurrections, rebellions, counterfeittings, clippings, washings, false coinings, and other falsities of the money of *Great Britain*, and other kingdoms or dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful assemblies, meetings and conventicles, unlawful uttering of words, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions,

retentions, escapes, contempts, falsities, negligencies, concealments, maintenances, oppressions, champarties, deceipts, and all other evil doings, offences, and injuries whatsoever; and also the accessories of them within the county aforesaid (as well within liberties as without) by whomsoever, and in what manner soever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises, and every of them, or any of them, in any manner whatsoever, and the said treasons and other the premises, according to the laws and customs of *England* for this time to hear and determine, *John Lettbridge* esquire sheriff of the said county of *Somerset* doth return the said writ directed to the sheriff of the said county, thus indorsed (to wit); "the within named *John Yandell*, *James Yandell*, and *Joseph Yandell*, are not, nor is either of them, found in my bailiwick; *John Lettbridge*, sheriff of *Somerset*." Whereupon at the said last mentioned assizes, and general session of oyer and terminer, and general gaol delivery of our said lord the king, holden at the City of *Wells* aforesaid, in and for the said county of *Somerset*, on the said *Monday* the said twenty-eighth day of *July* in the said twenty-eighth year of the reign of our said lord the king, before the said justices, and others their fellows, last above mentioned, the sheriff of the said county of *Somerset* by another writ of our said lord the king is commanded, as formerly he was commanded, that he omit not by reason of any liberty in his bailiwick, but that he take the said *John Yandell*, *James Yandell*, and *Joseph Yandell*, if they shall be found in his bailiwick, and them safely keep, so that he may have their bodies before the justices of our said lord the king at the next assizes and general gaol delivery to be holden for his county, to answer to our said lord the king concerning the said felonies, of which they stand indicted; at which next assizes and general session of oyer and terminer and general gaol delivery, to wit, at the assizes and general session of oyer and terminer and general gaol delivery of our lord the king, holden at the Castle of *Taunton* in and for the county of *Somerset*, on *Friday* the twenty-seventh day of *March* in the twenty-ninth year of the reign of our sovereign lord *George* the Third, king of *Great Britain* &c. before *Sir William Henry Ashburst* knight, one of the justices of our lord the king assigned to hold pleas before the king himself, *Francis Buller* esquire, one other of the justices of our said lord the king, assigned to hold pleas before the king himself, and others

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against
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fendants not
found.

Alias capias.

Returnable
the next as-
sises.

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YANDELL.

Return as
before.

Pluries
capias.

others their fellows, justices of our said lord the king, assigned by letters patent of our said lord the king under his great seal of *Great Britain* to the said Sir *William Henry Ashburst, Francis Buller, &c.* (here this commission was set out *verbatim* like the last) *John Lethbridge* Esquire, sheriff of the said county of *Somerset*, doth return the said last mentioned writ, directed to the sheriff of the said county, thus indorsed (to wit); "I hereby humbly certify to the justices within named that the within named *John Yandell, James Yandell, and Joseph Yandell*, are not, nor is either of them, found in my bailiwick; The answer of *John Lethbridge*, sheriff of *Somerset*." Wherefore at the said last mentioned assizes and general session of *oyer and terminer*, and general gaol delivery, of our said lord the king, holden at the castle of *Taunton* aforesaid, in and for the said county of *Somerset*, on the said *Friday* the twenty-seventh day of *March* in the said twenty-ninth year of the reign of our said lord the king, before the said justices and others their fellows, last above-mentioned, the sheriff of the said county of *Somerset* by another writ of our said lord the king is commanded (as oftentimes he hath been commanded) that he do not omit, by reason of any liberty in his bailiwick, but that he take the said *John Yandell, James Yandell, and Joseph Yandell*, if they shall be found in his bailiwick, and them safely keep, so that he may have their bodies before the justices of our said lord the king at the next assizes and general gaol delivery, to be holden for the said county, to answer to our said lord the king concerning the said felonies, whereof they stand indicted; at which said next assizes and general gaol delivery, (to wit) at the assizes and general session of *oyer and terminer* and general gaol delivery of our lord the king, holden at *Bridgewater* in and for the county of *Somerset*, on *Saturday* the fifteenth day of *August* in the twenty-ninth year of the reign of our sovereign lord *George the Third*, king of *Great Britain &c.* before the Right Honourable *Lloyd Lord Kenyon*, Lord Chief Justice of our lord the king, assigned to hold pleas before the king himself, *Francis Buller* Esquire, one of the justices of our said lord the king, assigned to hold pleas before the king himself, and others their fellows, justices of our said lord the king, assigned by letters patent of our said lord the king, under his great seal of *Great Britain*, to the said *Lloyd Lord Kenyon, Francis Buller*, and others their fellows, justices of our said lord the king, and to any two or more of them directed &c, (this commission was also set out *verbatim*)

*George
Templer*

Templer Esquire, now sheriff of the said county of *Somerset*, doth return the said last mentioned writ, directed to the sheriff of the said county, thus indorsed (to wit), "I do hereby humbly certify that the within named *John Yandell*, *James Yandell*, and *Joseph Yandell*, are not, nor is any or either of them, found in my bailiwick; *George Templer* sheriff." Therefore at the said last mentioned assizes and general session of oyer and terminer, and general gaol delivery of our said lord the king so holden at *Bridgewater* aforesaid, in and for the said county of *Somerset* on the said *Saturday* the fifteenth day of *August*, in the said twenty-ninth year of the reign of our said lord the king, before the said justices and others their fellows last above mentioned, The sheriff of the said county of *Somerset* by another writ of our said lord the king is commanded that he cause to be called the said *John Yandell*, *James Yandell*, and *Joseph Yandell*, from county court to court, until they, according to the laws and customs of *England*, be outlawed, if they do not appear; and if they do appear, then that he take and keep them in safe custody, so that he have their bodies before the justices of our said lord the king assigned by letters patent under his seal of *Great Britain* to inquire of all treasons, murders, felonies, and other misdeeds, offences, and injuries, whatsoever, committed within the county of *Somerset*, and the same premises to hear and determine according to the laws and customs of *England*, at the next assizes and general session of oyer and terminer and gaol delivery to be holden for his county, to answer our said lord the king concerning certain felonies, whereof they are indicted, and whereof the said last named sheriff hath returned now to the said justices of our said lord the king that they the said *John Yandell*, *James Yandell*, and *Joseph Yandell*, are not, nor is any or either of them, found in his bailiwick; And also at the said assizes and general session of oyer and terminer and general gaol delivery so holden at *Bridgewater* aforesaid, in and for the said county of *Somerset*, on the said *Saturday* the said fifteenth day of *August* in the twenty-ninth year aforesaid before the same justices, and others their fellows, last above mentioned, the sheriff of the said county of *Somerset* by another writ of our said lord the king is commanded that, by the statute in the thirty-first year of the reign of the late queen *Elizabeth* of *England* made and provided, he cause the said *John Yandell*, *James Yandell*, and *Joseph Yandell*, to be proclaimed three several days according to the form of that statute, *whereof one of the said proclamations to be made in open court*

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against
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Same return.

Writ of ex-
igent.Writ of pro-
clamation.

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in the said sheriff's county, one other at the general quarter sessions of the peace to be holden for the said sheriff's county, and one other at or near the most usual door of the parish church of *Brompton Ralph* (a) aforesaid, where they are inhabiting, that they render themselves to the said sheriff, so that he may have their bodies before the justices of our said lord the king at the aforesaid next assizes and general session of oyer and terminer and gaol delivery, to be holden for his county, to answer our said lord the king as aforesaid; at which said next assizes and general session of oyer and terminer and general gaol delivery holden at the castle at *Taunton*, in and for the county of *Somerset*, on *Thursday* the twenty-fifth day of *March* in the thirtieth year of the reign of our sovereign lord *George the Third*, king of *Great Britain* &c, before *Sir Beaumont Hotbam* knight, one of the barons of our lord the king of his court of exchequer, *Sir Richard Perryn* knight one other of the barons of our said lord the king of his said court of exchequer, and others their fellows justices of our said lord the king, assigned by letters patent of our said lord the king under his great seal of *Great Britain*, to the said *Sir Beaumont Hotbam*, *Sir Richard Perryn*, and others, their fellows justices of our said lord the king, and to any two or more of them directed &c, (This commission set out,) *John Stephenson* Esquire, now sheriff of the said county of *Somerset*, doth return the aforesaid writ of exigent, directed to the sheriff of the said county, thus indorsed (to wit); "I do hereby certify to the justices of our lord the king of oyer and terminer within mentioned that this writ was delivered to me on the twenty-eighth day of *December*, in the thirtieth year of the reign of our sovereign lord *George the Third*, king of *Great Britain*, &c; and that after the receipt of the said writ, and by virtue thereof, at my county court of *Somerset* holden at *Iwelchester* in and for the county of *Somerset* within written, on *Wednesday* the twenty-seventh day of *January*, in the thirtieth year of the reign of our said lord the king, the within named *John Yandell*, *James Yandell*, and *Joseph Yandell*, were first called, and did not appear, nor did any or either of them appear; and that afterwards at my county court of *Somerset*, holden at *Iwelchester* in and for the said county of *Somerset*, on *Wednesday* the twenty-fourth day of *February* in the thirtieth year of the reign of our said lord the king, the within named *John Yandell*, *James Yandell*, and *Joseph Yandell*, were a second time called, and did not appear, nor did any or either of them appear; The answer

Return to
exigent.

1st time cal-
led.

2d time cal-
led.

(a) The parish, as late belonging to which the prisoners were described in the indictment.

of *George Templer* Esquire, sheriff of the county of *Somerset*;" "I do hereby certify to the justices of our said lord the king of oyer and terminer within mentioned that this writ, as it is above indorsed, was delivered to me the under-named present sheriff of the county of *Somerset* by the above named late sheriff at the time of his going out of his office, and that afterwards by virtue of the said writ at my county court of *Somerset*, holden at *Iwelchester* in and for the county of *Somerset* within written, on *Wednesday* the twenty-fourth day of *March*, in the thirtieth year of the reign of our said lord the king, the within named *John Yandell*, *James Yandell*, and *Joseph Yandell*, were a third time called, and did not appear, nor did any or either of them appear; The answer of *John Stephenson* Esquire, sheriff of the said county of *Somerset*." And at the said last mentioned assizes and general session of oyer and terminer and gaol delivery, holden as last above-said at the *Castle of Taunton* aforesaid, in and for the said county of *Somerset*, on the said *Thursday* the twenty-fifth day of *March* in the thirtieth year aforesaid, before the said justices and others their fellows justices last above-mentioned, the said *John Stephenson*, now sheriff of the said county of *Somerset*, doth return the aforesaid writ of proclamation directed to the sheriff of the said county, thus indorsed (to wit); "I do hereby certify to the justices of our lord the king of oyer and terminer within mentioned that this writ was delivered to me on the 28th day of *December* in the thirtieth year of the reign of our sovereign lord *George* the Third king of *Great Britain* and so forth; and that after the receipt of the said writ, and by virtue thereof, at my county court of *Somerset* holden at *Iwelchester* in and for the county of *Somerset* within written, on *Wednesday* the 27th day of *January* in the 30th year of the reign of our said lord the king, I caused the first proclamation to be made in open court in the said county, that the within named *John Yandell*, *James Yandell*, and *Joseph Yandell*, should render themselves to me, so that I might have their bodies before the justices of our lord the king within written at the next assizes and general session of oyer and terminer and gaol delivery to be holden for the said county, to answer our said lord the king concerning certain felonies, whereof they are indicted, as by this writ I am commanded; and the within named *John Yandell*, *James Yandell*, and *Joseph Yandell*, are not, nor are any or either of them, found in my bailiwick. The answer of *George Templer* esquire sheriff of the county of *Somerset*." "I do hereby certify to the justices of our lord the king of oyer and terminer within mentioned

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3d time called.

Return to
writ of pro-
clamation.1st proclama-
tion.

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against
YANDELL.2d writ of
exigent.

mentioned that this writ, as it is above indorsed, was delivered to me the under named present sheriff of the county of *Somerset* by the above named late sheriff at the time of his going out of his office; The answer of *John Stephenson* esquire sheriff of the said county of *Somerset*." Whereupon at the said last mentioned assizes and general session of oyer and terminer and gaol delivery of our said lord the king, so holden at the Castle of *Taunton* aforesaid in and for the said county of *Somerset*, on the aforesaid *Thursday* the 25th day of *March*, in the said thirtieth year of the reign of our said lord the king, before the said justices and others their fellows last above mentioned, the sheriff of the said county of *Somerset* by another writ of our said lord the king is commanded that, (allowing the three county courts of *Somerset* holden in and for the said county of *Somerset*, at which the said *John Yandell*, *James Yandell*, and *Joseph Yandell*, were called, and did not appear, nor did any or either of them appear, as the late sheriff of the said county of *Somerset*, and also the said now sheriff of the said county of *Somerset*, have returned to the justices of our said lord the king, assigned by letters patent of our said lord the king under his seal of *Great Britain*, to inquire of all treasons, murders, felonies, and other misdeeds, offences, and injuries, whatsoever, committed within the county of *Somerset*, and the same premises to hear and determine, according to the laws and customs of *England*, at the assizes and general session of oyer and terminer and gaol delivery holden for the said county on the 25th day of *March* then instant,) he cause the said *John Yandell*, *James Yandell*, and *Joseph Yandell*, to be further called at the said sheriff's next county courts, until they, according to the laws and customs of *England*, be outlawed, if they do not appear, and if they do appear, then that he take them and keep them in safe custody, so that he have their bodies before his majesty's justices assigned by letters patent of our said lord the king under his seal of *Great Britain*, to inquire of all treasons, murders, felonies, and other misdeeds, offences, and injuries whatsoever, committed within the county of *Somerset*, and the same premises to hear and determine according to the laws and customs of *England*, at the next assizes and general session of oyer and terminer and gaol delivery to be holden for his county, to answer our said lord the king concerning certain felonies whereof they are indicted; and also at the said assizes and general session of oyer and terminer and gaol delivery so holden at the Castle of *Taunton* aforesaid in and for the said county of *Somerset* on the

faid *Thursday* the 25th day of *March*, in the thirtieth year afore-
 faid, before the same justices, and others, their fellows last above
 mentioned, the sheriff of the faid county of *Somerset* by another
 writ of our faid lord the king is commanded, that, (allowing
 the proclamation made by his majesty's late sheriff of the faid
 county of *Somerset* at his county court of *Somerset* holden in and
 for the faid county of *Somerset* on *Wednesday* the 27th day of
January then last past, that the faid *John Yandell*, *James Yandell*,
 and *Joseph Yandell*, should render themselves to his faid majesty's
 faid late sheriff, so that he might have their bodies before the
 justices of our faid lord the king, assigned by letters patent un-
 der *his majesty's seal* of *Great Britain*, to inquire of all treasons,
 murders, felonies, and other misdeeds, offences, and injuries,
 whatsoever, committed within the county of *Somerset*, and the
 same premises to hear and determine, according to the laws and
 customs of *England*, at the assizes and general session of oyer and
 terminer and gaol delivery holden for the faid county on the
 25th day of *March* then instant) he cause the faid *John Yandell*,
James Yandell, and *Joseph Yandell* to be further proclaimed two
 several days, according to the form of the statute in such case
 made and provided; one of the faid proclamations to be made
 at the general quarter session of the peace to be holden for the
 faid county, and the other of the faid proclamations to be made
 at or near the most usual door of the parish church of *Brompton*
Ralph aforefaid, where they are inhabiting, *that they render them-*
selves to the said sheriff, so that he may have their bodies before his ma-
jesty's justices at the next assizes and general session of oyer and terminer
and gaol delivery to be holden for his county, to answer our faid lord
the king concerning certain felonies, whereof they are indicted;
 At which faid next assizes and general session of oyer and termi-
 ner and gaol delivery, holden at the city of *Wells* in and for the
 county of *Somerset* on *Monday* the 9th day of *August* in the thir-
 tieth year of the reign of our sovereign lord *George* the Third,
 king of *Great Britain* &c, before *John Heath* esquire, one of the
 justices of our lord the king of his court of common pleas, Sir
Nash Grose, knight, one of the justices of our faid lord the king,
 assigned to hold pleas before the king himself, and others their
 fellows, justices of our faid lord the king, assigned by letters
 patent of our faid lord the king under his great seal of *Great*
Britain, to the faid *John Heath*, Sir *Nash Grose*, and others their
 fellows justices of our faid lord the king, and to any two or more
 of them directed, (This commission also set forth,) *John Ste-*

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 YANDELL.
 2d writ of
 proclamation

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exigent.4th time cal-
led.5th time cal-
led.Judgment of
outlawry.Return of last
writ of pro-
clamation.

Stephen esquire, now sheriff of the said county of *Somerset*, doth return the said last mentioned writ of exigent, directed to the sheriff of the said county thus indorsed (to wit); "I do hereby certify to the justices of our lord the king of oyer and terminer within mentioned that this writ was delivered to me on the 28th day of *March* in the thirtieth year of the reign of our sovereign lord *George* the Third king of *Great Britain* &c, and that after the receipt of the said writ, and by virtue thereof, at my county court of *Somerset* holden at *Iwelcbester* in and for the county of *Somerset* within written, on *Wednesday* the 21st day of *April*, in the thirtieth year of the reign of our said lord the king, the within named *John Vandell*, *James Vandell*, and *Joseph Vandell*, were a fourth time called, and did not appear, nor did any or either of them appear; and that afterwards at my county court of *Somerset*, holden at *Iwelcbester* in and for the said county of *Somerset*, on *Wednesday* the 19th day of *May* in the thirtieth year of the reign of our said lord the king, the within named *John Vandell*, *James Vandell*, and *Joseph Vandell*, were a fifth time called, and did not appear, nor did any or either of them appear; Therefore by the judgment of *Daniel Follett Scadding* gentleman, and *Peter Layng* gentleman, coroners of our said lord the king of the said county of *Somerset*, and according to the laws and customs of *England*, the said *John Vandell*, *James Vandell*, and *Joseph Vandell*, are outlawed, and each of them is severally outlawed. The answer of *John Stephenson*, sheriff of the said county of *Somerset*." And also at the said last mentioned assizes, and general session of oyer and terminer and gaol delivery, holden as last above-said at the city of *Wells* aforesaid, in and for the said county of *Somerset*, on the said *Monday* the said 9th day of *August* in the thirtieth year aforesaid before the said justices and others their fellows justices last above mentioned, the said *John Stephenson*, now sheriff of the said county of *Somerset*, doth return the said last mentioned writ of proclamation directed to the sheriff of the said county, thus indorsed (to wit); "I do hereby certify to the justices of our lord the king of oyer and terminer within mentioned that this writ was delivered to me on the 28th day of *March* in the thirtieth year of the reign of our sovereign lord *George* the Third, king of *Great Britain* and so forth, and that after the receipt of the said writ, and by virtue thereof, at the general quarter session of the peace of our lord the king holden for the county of *Somerset* at the city of *Wells* in the said county, on *Wednesday* the 14th day of *April* in the thirtieth

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thirtieth year of the reign of our said lord the king, I caused the second proclamation to be made in open court, *that the within named John Yandell, James Yandell, and Joseph Yandell, should render themselves to me, so that I might have their bodies before the justices of our lord the king within written at the next assizes and general session of oyer and terminer and gaol delivery to be holden for the said county to answer our said lord the king concerning certain felonies, whereof they are indicted, as by this writ I am commanded; and that afterwards at the most usual door of the church of the parish of Brompton Ralph within mentioned, on Sunday the 18th day of April in the thirtieth year of the reign of our said lord the king, immediately after divine service and sermon (one month at least before the within named John Yandell, James Yandell, and Joseph Yandell, were a fifth time called, by virtue of a certain writ of exigent of our said lord the king) I caused the third proclamation to be made, that the within named John Yandell, James Yandell, and Joseph Yandell, should render themselves to me, so that I might have their bodies before the justices of our lord the king within written at the next assizes and general session of oyer and terminer and gaol delivery to be holden for the said county to answer our said lord the king, concerning certain felonies, whereof they are indicted, as by this writ I am commanded; and the within named John Yandell, James Yandell, and Joseph Yandell, are not, nor are any or either of them, found in my bailiwick; the answer of John Stephenson, sheriff of the said county of Somerset."*

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2d. time pro-
claimed.

3d. time pro-
claimed.

By the Court. Follett.

Assignment of Errors.

And hereupon the said John Yandell, James Yandell, and Joseph Yandell, come in their proper persons and severally say that in the record and process, and also in the publication of the aforesaid outlawry, there is manifest error in this; that the said John Yandell, James Yandell, and Joseph Yandell, are alleged to be a fifth time demanded and outlawed on the 19th day of May in the 30th year of the reign of our lord the now king, when it appears by the writ of proclamation, which is alleged to have issued on Thursday the 25th day of March in the 30th year aforesaid, and the proclamations returned thereon, that they the said John Yandell, James Yandell, and Joseph Yandell, had a day given to render themselves to the sheriff, so that he might have their bodies before the justices therein named, until the assizes and general session of oyer and terminer and gaol delivery,

Assignment
of errors.

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holden for the county of *Somerset* next after the 18th day of *April*, in the 30th year aforesaid, being the 9th day of *August* in the 30th year aforesaid; therefore in that there is manifest error. There is also error in this, that the writ of exigent appears to have issued contrary to the statute in that case made and provided against *Joseph Yandell*, who is only charged as accessory after the fact to a felony alleged to have been committed by *John Yandell* and *James Yandell*, and appears to be outlawed by the same judgment as that whereby the said principals are outlawed; whereas by the law of the land none shall be outlawed as accessories until the principals be attainted, but their exigent shall remain until such principal be attainted by outlawry or otherwise; therefore in that there is manifest error. There is also error in this, that the writ of *capias* which is alleged to have issued on *Monday* the 28th day of *July* in the 28th year of the reign of our said lord the king is not returnable as the statute in that case made and provided directs; nor does it appear that there is comprized therein any command to the sheriff to cause to be seized the chattels of the said *John Yandell*, *James Yandell*, and *Joseph Yandell*, and safely to keep them till the day of the said writ returned, as by the law of the land is required; neither is it alleged that the said *John Yandell*, *James Yandell*, and *Joseph Yandell*, did not appear before the exigent was awarded, as by the law of the land ought to have been alleged; therefore in that there is manifest error. There is also error in this, that it is not expressly alleged that the writs of proclamation or either of them were or was delivered to the said sheriff three months before the return of the same, as by law it ought to have been alleged; therefore in that there is manifest error. There is also error in this, that the said writs of proclamation do not appear to be issued or executed as the statute in that case made and provided requires; therefore in that there is manifest error. There is also error in this, that it is not alleged in the returns to the said writs of proclamation, that the said *John Yandell*, *James Yandell*, and *Joseph Yandell*, did not, after the making of each of the said several proclamations, required by the said writs, appear and render themselves to the said sheriff, as by the law of the land it ought to have been alleged; therefore in that there is manifest error. Wherefore the said *John Yandell*, *James Yandell*, and *Joseph Yandell*, severally pray that the outlawry aforesaid, for the errors aforesaid, and other the errors appearing in the record

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cord and process aforesaid may be reversed, and held for nothing; and that they may severally be restored to the common law, and to all which they have lost by occasion of the outlawry aforesaid. And *James Templer*, esquire, coroner and attorney of our present sovereign lord the king, in the court of our said lord the king before the king himself, who for our said lord the king in this behalf prosecuteth, being present here in court in his proper person, and having heard the matters aforesaid above assigned for error, for our said lord the king saith that in the record and process, and also in the publication of the aforesaid outlawry, there is not any error; therefore he prayeth that the said court of our said lord the king now here may proceed to examine as well the record and process, and also the publication of the aforesaid outlawry, as the matters above assigned and alleged for error, and that the outlawry aforesaid may in all things be affirmed &c.

This writ of error was twice argued; the first time in last *Easter* term by *Litchfield* for the prisoners, and *Wood* for the prosecutor; the second in *Trinity* term last by *Lens* for the former and *Perceval* for the latter.

The Court took time to consider of the several objections; and on this day

Lord KENYON, Ch. J. delivered the unanimous opinion of the Court, as follows;—The objections made to this outlawry on the first argument were divided and subdivided into 17 (a) in number; many of them were so fully answered at the bar, that the counsel for the prisoners upon the second argument rightly confined himself to the seven following objections, of which I shall take notice in the order in which they were made. 1st, That the prisoners have a day given to them upon the record to appear after the outlawry was pronounced. 2dly, That the writ of exigent is contrary to the statute of *Westm.* 1. c. 14. 3dly, That the second writ of *capias* is bad, because it does not contain a command to seize the goods of the prisoners. 4thly, That it is not alleged that each writ of proclamation was

(a) Though the objections branched out into 17, many of them were subdivisions of some general ones; and the only objections not included in those now answered by the Court were three; 1st, That it was not alleged that "the indictments did not come in" before the exigent awarded. 25 *Ed.* 3. st. 5. c. 14, 2d. That it did not appear that the *capias* and *exigent* were under seal,

but only signed by the justices of oyer and terminer, &c. 2 *Hale's P. C.* 199. 3d, That the *exigent* was returnable before the justices of our lord the king assigned by letters patent under his seal of Great Britain, not saying great seal. In answer to the last, 2 *Inst.* 555. was cited, where it is said "sigillum regis" generally spoken is the "great seal."

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delivered to the sheriffs three months before the return of it. 5thly, That the writs of proclamation were neither issued, or executed, according to the statute. 6thly, That it is not alleged after each proclamation that the prisoners did not appear and render themselves; and 7thly, That the names of the coroners, by whom the outlawry was pronounced, are not subscribed to this record.

As to the 1st objection (a); If it were well founded in fact, we think it would have been fatal, according to the judgment of this Court in the case of *The King against Barrington*. But the two cases are not alike; and it will be sufficient to state the record only, to shew the material distinction between them, and to prove it to be as clear that these prisoners had not a day given to them to appear after the outlawry, as it was that *Barrington* had such a day given to him. In *Barrington's* case the prisoner was outlawed on the 21st *February*; and the writ of proclamation required the sheriffs to proclaim him, so that he should be *before the justices* of the peace at the general sessions of the peace to be holden for the county aforesaid next after the first day of *February* next ensuing; and the return by the sheriffs to that writ was that he had proclaimed the said *George Barrington*, that he should be before his majesty's justices of the general sessions of the peace last within mentioned. The next sessions of the peace were holden on the 25th *February*; so that by the terms of the writ, and by the proclamation too, the prisoner had a day given to him to appear till the 25th *February*;

(a) In this case it was argued that the objection in *Barrington's* case, *ante* 3 vol. 499. was of a two-fold nature. 1st, That he was required by the writ of proclamation to be *before the justices &c.*; and 2dly, That he was required to render himself on a day subsequent to that on which he was outlawed. That though the first of those did not hold in this case, the latter did. That the time was the material point to be attended to. That the prisoners would have answered the exigency of the writ of proclamation, and the proclamations made thereon, by appearing at the assizes on the 9th *August*, which was subsequent to the time when the judgment of outlawry was pronounced, according to the legal as well as general acceptance of the words "to render themselves to the sheriff, so that he might have their bodies at the next assizes to be held on the 9th. of

August." That in the common case of a *capias* or *latitat*, where a sheriff is commanded to take a defendant, so that he have his body at the return of the writ, the sheriff complies with the requisitions of the writ by having the defendant on the day of the return. That the terms of these proclamations, which were required in aid of the *exigent*, and for the purpose of greater notoriety, were calculated to mislead the prisoners; and that the sheriff should either have proclaimed the prisoners to surrender themselves *generally*, leaving it to them to enquire when the fifth county court would be held, or he should have specified in his proclamations the day when that Court would be held, requiring them to surrender before they were a fifth time exacted, as was done in *R. v. Russell*, 30 *Geo. 3*.

and

and if he had appeared on that day, he would have complied with the requisition of the writ, and have saved his default. But he was outlawed before that day came, *viz.* on the 21st February; and upon that ground the Court held the outlawry bad. In the present case the writs of proclamation were issued by the courts of oyer and terminer, requiring proclamations to be made that the prisoners render themselves *to the sheriff*, so that he might have their bodies before the justices &c at the next sessions of oyer and terminer, to be holden for the said county; and the prisoners were proclaimed at the proper times and places before the return of those writs to surrender *themselves to the sheriff*. Under these writs it was the duty of the prisoners to render themselves to the sheriff before the 5th county court; or in default of doing so, they stood liable to the outlawry. It is impossible to allow this objection, without saying in broad terms that an outlawry (which is a legal process, sanctioned by all the authorities in the law both ancient and modern, and interwoven in the constitution itself,) never can legally exist in this country. By law the outlawry must be completed before the return of the writ of *exigent*. That writ requires the sheriff to call the party from county court to county court till he is outlawed: and if the sheriff neither bring in the party on a caption or render before the outlawry, or return a complete outlawry at the time that the writ of *exigent* is returnable, he has not complied with the writ, or done his duty. In this case, therefore, no day was given to the prisoners to surrender themselves *to the justices on the return of the exigent* and proclamation, but they were required to surrender themselves *to the sheriff*; which is the accurate and correct mode of proceeding.

The 2d objection is that the writ of *exigent* is contrary to the statute of *Westm.* 1. c. 14. The statute of 3 *Ed.* 1. c. 14. enacts that no accessory be outlawed until he that is appealed of the deed be attainted (a). But that statute relates solely to the case of the accessory, and in no wise applies to a proceeding against the principal. The statute mentions the case of an appeal only; but it has been determined that it extends to indictments as well as to appeals. And in *Bro. tit. Exigent, pl. 44.* it is said that if it appear in the writ of appeal that one is principal and others accessories in an appeal against three, there the *exigent* shall not issue

(a) It proceeds to enact that "their *exigent* shall remain until such as be appealed of the deed be attainted by outlawry, or otherwise." This, it was contended, was equivalent

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issue against the accessories, until the principal be outlawed. But if it do not appear by the writ (a), then it is not error, though the exigent issue against all together. This authority relates to the case of the accessory only, and by no means proves that, if the process be erroneous as to the accessory, it shall be so in respect of the principal also. Another case quoted in behalf of the prisoners was 1 *Bulstr.* 74; where in an appeal against several, some as principals, and one as accessory, the accessory pleaded that there was no such person in *rerum naturâ* as one of the principals; and that was holden to be a good plea. This case proves only that in an appeal an accessory may plead the misnomer of the principal; and if by any means an end be put to the indictment or appeal against the principal, most unquestionably it must fail as against the accessories also. In this point there seems to be a distinction between an appeal and an indictment; for 2 *H. H. P. C.* 201. says if an appeal be brought against a man as accessory to two, he must be proved accessory to both: But if he be indicted as accessory to two, he may be convicted on evidence which proves him accessory to one only. And in 2 *H. H. P. C.* 177. it is expressly laid down that, if several persons be indicted for one offence, misnomer or want of addition of one quashes the indictment

equivalent to saying that the exigent *should not issue*. That it was therefore void not only as to the accessory, but as to the principals also, it being an entire writ. That there was a distinction in civil actions between those causes for which a writ abated as to one defendant, and those which made it void as to all; that if there were any extrinsic fact, as a misnomer or a wrong addition, or if any thing happened pending the writ, as the death of one party, to abate the writ as against one defendant, it would still be good as against the rest; but if the writ were bad upon the face of it, or it issued when in law it ought not, as in the instance of one defendant being dead before the writ was purchased*, it is void as to all the defendants. 8 *Rep.* 159. b; 27 *Hen.* 8. fo. 26. b. pl. 9; 21 *Hen.* 7. fo. 34. pl. 39; & 7 *Hen.* 4. fo. 27. pl. 4. And that the same objection also applied to the judgment which was given upon this writ; for no judgment can be given on a bad writ, 1 *Roll. Rep.* 2. 1 *Roll.*

Abr. 175. pl. 1. Trespass against three; one died pending the writ, and judgment against all three; the whole judgment was reversed on a writ of error. *Scudamore v. Scriven*, 1 *Ro. Abr.* 775. pl. 2. So in case of infancy; 1 *Roll. Abr.* 776. pl. 9. So in the case of the coverture of one defendant. *Ib.* pl. 10. The counsel for the prosecutor, after admitting the objection as to the accessory,† answered (in addition to what is said by the court in their answer to this objection) that the cases of civil actions did not apply to the present; because the process, as well as the crime, is in its nature several; 2 *Hale P. C.* 177; that therefore the exigent might be good as against the principals, though it was bad as against the accessory; and that the judgment of outlawry upon this record was also several, "they are and each of them is severally outlawed &c."

(a) The original writ of appeal; See 44 *Aff.* p. 16. See also 45 *Aff.* pl. 9. and 3 *Inst.* 233.

* *Sed. vid. Plowd.* 98. marg.

† The outlawry was accordingly reversed

as to Joseph Vandell; and he was afterwards bailed.

only

only against him; and the others shall be put to answer; for they are in law as several indictments; and so in trespass. If the indictment be considered as several against each defendant, which we think it must be, this objection, though it is material and has already been allowed in the case of the accessory, cannot avail the principals. And so it is laid down by Serjt. *Hawkins* in *b. 2. c. 27. §. 130*; who says "that it seems to be agreed that wherever some of the defendants are expressly charged as principals, and others as accessories, before the award of the exigent, the outlawry of those *charged as accessories cannot be but reversible*." I lay out of the case all the authorities, quoted relative to civil actions, because they proceed on a very different ground. There the judgment given for damages is intire; and if it cannot be supported against all, it must be reversed *in toto*; because the court cannot sever the damages, and say that each defendant shall be severally liable for his proportion of them. But even in those cases, if different parts of a judgment can be severed, the court will reverse it in part, and affirm it for the residue; as appears by the case quoted from *2 Rol. Rep. 136.* and many more modern determinations (a).

The third objection is, that the 2d writ of *capias* is bad, because it does not contain a command to the sheriff to seize the goods of the prisoners, which it was argued was required by the statute, for the purpose of giving the party notice. This objection is founded on the stat. 25 *Ed. 3. §. 5. c. 14.* which enacts "that after any man is indicted of felony before the justices in their sessions to hear and determine, it shall be commanded to the sheriff to attach his body by writ, or by precept, which is called a *capias*: and if the sheriff return that the body is not found, another *sapias* shall be incontinently made returnable at three weeks after; and in the same writ it shall be comprised that the sheriff shall cause to be seized his chattels, and safely to keep them till the day of the writ returned. And if the sheriff return that the body is not found, and the indicted cometh not, the exigent shall be awarded, and the chattels shall be forfeit, as the law of the crown ordaineth: but if he come and yield himself, or be taken by the sheriff before the return of the second *capias*, then the goods and chattels shall be saved." If this statute were ever intended to apply to a court of assizes, and oyer and terminer, to be sure the language of it is very incorrect: for when an act mentions justices in their sessions, the natural and most

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obvious meaning of those words is the justices of the peace in their general or quarter sessions. But the provision made by it is totally incompatible with a court of assizes, and oyer and terminer; for there never was a period in the annals of this country, when that court sat from three weeks to three weeks. Lord Ch. J. *Hale*, in 2 *Pl. Cr.* 195, considers the statute as inapplicable to this court or to any court where the justices sit by commission; for (says he) the second *capias* is to be returnable at three weeks after, which may be out of term, or after the sessions of the justices are ended. We concur in this opinion; and we think it is strongly fortified by the stat. of 8 *H. 6. c.* 10, and the construction which Lord Ch. J. *Hale* has put upon it. That act consists of two parts; 1st. That a second *capias* shall issue where the party is in a foreign county; 2dly, If the party be conversant in the county where he was indicted at the time of the felony, the process shall be *as hath been used before this time*; which words Lord Ch. J. *Hale* renders thus, the process shall be *as it was at common law*. In the same page Lord Ch. J. *Hale* states it, as clear and unquestionable, that at that day the process in case of an indictment of any felony was only one *capias*, and then an exigent. If so, undoubtedly the stat. of 25 *Ed. 3.* which requires two *capias* could not extend to all courts of oyer and terminer; and if it do not, it must necessarily be confined to the sessions of the justices of the peace. *Hawkins* makes a distinction as to the process upon indictments and appeals for offences which are or are not capital: but I shall not pursue that inquiry farther, because we do not feel ourselves called upon to say in this case whether two *capias* were necessary, or whether one only was sufficient. Lord Ch. J. *Hale* makes a *quære* as to the usage on the stat. of 25 *Ed. 3.* If that usage has been consistent with what we consider as the true and plain construction of the words of the statute, it will greatly fortify that opinion: If on the contrary the usage has been the other way, it will be incumbent on the court, notwithstanding what is said by *Hale*, to see if the statute can be made consistent with it. All the precedents, which we have been able to find on this subject, are one way. In the *King v. Morley*, *Trem. Ent.* 280; in the *King v. Cranstoun*, and in the *King v. Barrington*, there was a second *capias*; and in neither of them is there any command to seize the goods. The *King v. Morley* was a case of some authority beyond the mere precedent; for it appears in 3 *Keb.* 125. that a writ of error was brought; and though objections were taken to the indictment, yet none

were made against the process. The words of the statute themselves, the precedents, and the authorities upon it, all concur that there is no weight in this objection.

The 4th objection is that it is not alleged that the writ of proclamation was delivered to the sheriff three months before the return of it. This objection was over-ruled by the Court upon the argument; and it is not warranted in point of fact; for it appears upon the record that the writ was delivered to the sheriff on the 28th of *December*, and was not returnable until the 25th *March*, which allowed an interval of more than three lunar months, and is all that is required. It can only appear by the return of the sheriff when the writ was delivered to him.

The 5th objection is that the writs of proclamation were neither issued or executed according to the statute. The writ of proclamation requires "one proclamation to be made in open court in the said sheriff's county; another at the general quarter sessions of the peace to be holden for the said sheriff's county, and another at or near the most usual door of the parish church of *Brompton Ralph* aforesaid, where they are inhabiting." The return of the sheriff to that writ is as follows; that "*at my county court of Somerset holden at Ivelchester in and for the county of Somerset within written on Wednesday 27th January, 30th Geo. 3. I caused the first proclamation to be made in open court in the said county &c.*" And afterwards to the second writ of proclamation, the sheriff returned that "*at the general quarter sessions of the peace of our lord the king, holden for the county of Somerset, at the city of Wells, in the said county, on Wednesday the 14th April, 30th Geo. 3, I caused the second proclamation to be made in open court &c; and that afterwards at the most usual door of the church of the parish of Brompton Ralph within mentioned, upon Sunday the 18th April, 30th Geo. 3, immediately after divine service and sermon, (one month at least before the within named prisoners (mentioning them by name) were a fifth time called by virtue of a second writ of exigent of our said lord the king) I caused the third proclamation to be made &c.*" The expressions in the writ, which have been objected to, are 1st, That it requires one proclamation to be made *in open court (a) in the*

(a) In support of this objection it was said that the "*open Court in the sheriff's county*" did not necessarily mean the *county court*, but might be understood to mean any public court of justice held within the coun-

ty. That it was not even described as *his* (the sheriff's) open court; but that, if it had been, that might have referred to his *torn*, as well as his county court.* And that if the writ of proclamation itself were bad,

* Vide 6 Hen. 7. 15. B. pl. 7; & 11 Hen. 7. 10. pl. 33.

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the sheriff's county; and the statute 31 Eliz. c. 3. requires it to be made in *the open county court*. 2dly, That it requires another proclamation to be made *at the general quarter sessions of the peace to be holden for the said sheriff's county*; and the words of the statute are that *one other of the said proclamations shall be made at the general quarter sessions of the peace in those parts where the party defendant at the time of the exigent awarded shall be dwelling*. 3dly, That it does not appear that the prisoners were dwelling in the town or place, at the church door of which the third proclamation was made. These objections are very nice and critical; and the answers to them lie within a very narrow compass. 1st. *The open court* in the sheriff's county is the *open county court*; the sheriff has no court but the county court: and the case cited from 1 Vent. 108. makes against the objection rather than for it; for the return of the proclamation was "*ad comitat. meum tent. apud* (such a place) *in com. praedict*;" and no objection was made to the words "*ad comitat. meum*:" but the outlawry was reversed for want of the words "*pro comitatu*," which objection does not hold in the present case. It was admitted at the bar on the second argument that this writ was agreeable to the precedents; and I will mention some which tend to shew that, if the writ had been more general than it is, yet it would have been good. In the *King v. Morley* the writ of exigent was to demand him from *county to county*; and the return was "*at our county of the same city*." In *Lilly's Ent.* 460. the writ of proclamation is to be proclaimed on three several days according to the statute, whereof let one proclamation be at or near the most usual door of the church of the parish of *A.* where the said defendant is dwelling &c. without mentioning any place where the other two should be. In *Thef. Brev.* 173. the exigent is to demand him from *county to county*: and there are two precedents of writs of proclamation the same as that in *Lilly's Entries*. So in *Clift's Entries*, 384. *Dalt. Sher.* and *Rast. Entr.* all the precedents are

the defect could not be supplied by a good return to it. The prosecutor's counsel answered this by observing that some of the old entries were more general than this writ, requiring the sheriff to proclaim the party three several times *according to the form of the statute*; that others were *ad comitatum*; and that in *Cranston's* case the writ

was like the present "*in open court in the sheriffs' county*." To this it was replied that "*comitatus*" signified either "*county*†" or "*county court*" according to the manner in which it was applied; and that *Cranston's* case could not be relied on as any authority, it never having been argued.

* Vid. stat. 13 Ed. 1. §. 1. c. 2. f. 1.
"ad comitatum vel ad aliam curiam."

† Vid. 21 Hen. 7. fo. 34. pl. 36. where

the word "*counties*" is used to express "*county courts*."

"*ad. com.*" In *Dalt. Sher.* 229. there are three precedents of the returns of the election of members of parliament; and in *p.* 230. one of the election of a coroner; all of which are *in pleno comitatu meo*. And in *Granstoun's* case, the writ was exactly in the same words as the present. As to the second objection; the words "*those parts* where the party defendant shall be dwelling" can mean nothing but county, riding, or division; and no other construction was attempted to be put upon them at the bar. The third objection is not applicable to the writ; because that expressly states that the prisoners are inhabiting in the parish of *Brompton Ralph*: but the return only states that the sheriff proclaimed them at the church door of the parish of *Brompton Ralph*, without adding the words *where they are inhabiting*. But we are of opinion that this return is sufficient; for the sheriff has done every thing which he was required by the writ to do, and has made a full return of that. If it appear on the record that the prisoners were inhabiting in the parish, that is sufficient; and here it is expressly so alleged in the writ. It was observed on the first argument that the indictment does not describe the prisoners as being *then* of that parish, but only as *late* of that parish. After the express averment in the writ which I have mentioned, the case is not open to that objection: but if the case were otherwise, there is no foundation for it. The constant form of indictments is to describe the prisoner *late* of such a place; and both *Hawkins* and *Hale* say the writ of proclamation shall go according to the place, of which he is so described.

The sixth objection is that the sheriff has not added to his return to each proclamation that the prisoners did not appear. It is not necessary that he should do so. The passage cited from 2 *Hale's P. C.* 204. speaks of the exigent only; and in the return to that writ it is necessary to state that they did not appear. The exigent is the writ, which commands the sheriff to take the prisoners; and the proclamation is merely a public notice of what is doing in another place. The precedents are against this objection also; and there is no authority in support of it. In truth, these last four objections were rather hinted at, than relied upon, in the second argument; and that is as much as they deserved.

The last objection is that the names of the coroners, by whom the outlawry was pronounced, are not subscribed to this record; and 2 *Hale's P. C.* 204. and 2 *Rol. Abr.* 802. were quoted upon this point, where it is said to have been determined that the

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names of the coroners must be subscribed to the judgment of outlawry, or, in the words of *Rolle*, *be put upon the record*; or else it is error. By law it is necessary that it should appear by whom the outlawry was pronounced, and that they had authority to pronounce that judgment, with the exception perhaps of an outlawry in the city of *London*; in which case it was determined in *The King v. Garrard*, *Cro. Jac.* 531. that an outlawry returned in the general words, "*ideo utlagatus est*," was good; the Court taking notice that there was not any coroner, but the mayor for the time being was perpetual coroner; and that the course was not to return there "*per judicium coronatorum*" but generally "*ideo utlagatus est*." From that case it is manifest that the law requires no more than what I have already stated, namely, that the names of the persons by whom the outlawry was pronounced, and that they had authority so to do, or in other words that they were coroners, should appear upon the record. But the point does not rest merely on inference from that case; for there are two other cases in the same book, which shew clearly what is required. The first is *Sir Edmund Button v. Awdley*, *Cro. Jac.* 521; where the outlawry was reversed because it was not said to be *per judicium coronatorum*; the other is *Patrick's case*, *Cro. Jac.* 528. where it was stated that the defendant was outlawed *per judicium coronatorum*, but the record did not shew the name of any of the coroners; and for that cause it was reversed. It never was contended that the coroners must sign the judgment with their own hands. In ancient times it was hardly possible; and there is no case in the law in which it is essential that the judge of a court should sign the judgment with his own hand. Besides, if that had been necessary, it could not have been done on this record, which is not the record of the coroners, but of the Court of oyer and terminer, made up from the returns of the sheriff, stating what had in fact been done under the mandates of the Court. The record in the present case states that "by the judgment of *Daniel Follett Scadding*, gentleman, and *Peter Layng*, gentleman, coroners of our said lord the king of the said county of *Somerset*, and according to the laws and customs of *England*, the prisoners are and each of them severally is outlawed." Therefore it does appear on the record by whom the outlawry was pronounced, and that they were the coroners, and consequently had authority to pronounce that judgment. For these reasons we are all of opinion that judgment must pass on the prisoner at the bar.

In the course of this enquiry another question arose whether the prisoners were entitled to their clergy; and that depends on the true construction of the statute 14 Geo. 2. c. 6. §. 1. which takes away clergy from those who are convicted of sheep-stealing. As that is a general question, we took the opinion of all the judges of England, who took time to consider it thoroughly; and I am authorised to deliver it as their unanimous opinion that "out-lawry" is a "conviction" (a) within the meaning of that act of parliament.

ASHHURST, J. then pronounced sentence of death on the prisoner James Yandell; John Yandell having died since this case was argued the second time.

(a) Vide Stat. 26 Hen. 8. c. 13. §. 5. 11 Rep. 29; Dr. Foster's Case, 11 Rep. 56. Ed. 6. c. 12. §. 10; 2 & 3 Ed. 6. c. 33; b; 1 Rol. Rep. 89. 2 Hawk. c. 33. §. 62. 5 & 6 Ed. 6. c. 11. §. 9; 39 El. c. 15. §. 2; 2 Hale P. C. 205; 345; 350; 352; 353; 1 Jac. 1. c. 8; 3 & 4 W. & M. c. 9. §. 2; Crompt. Off. Just. 9; & Foster 358. Co. Lit. 390. b; 391. a; Powlter's Case,

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THE defendant, having been rated towards the relief of the poor of the parish of Newbury for the tolls of the navigation of the river Kennet, at 33*l.* 6*s.* 8*d.* after the rate of 20*d.* in the pound on the sum of 400*l.*, appealed to the Berkshire quarter-sessions; where the rate was confirmed, subject to the opinion of this Court on the following case. By an act 1 Geo. (a) 1. c. 24. for making the river Kennet navigable from Reading to Newbury, in the county of Berks, it is enacted that in consideration of the great charges and expences the undertakers would be at, not only in making the river navigable, but also in repairing &c the works, wears, locks, &c, it should be lawful for the undertakers &c from time to time, and at all times thereafter, to ask, demand, &c for all and every such goods, &c, that should be carried or conveyed up or down the river Kennet, between Reading and Newbury, the rates and duties thereafter mentioned, and at such place or places adjoining to the river as the undertakers &c, should think fit; (viz.) for every ton weight of goods &c, that should be carried or conveyed in any boat barge or vessel up the river Kennet from Reading to Newbury, or down the river from Newbury to Reading, any sum not

Where by a navigation act the proprietor was entitled to a toll of 4*s.* per ton for goods carried from A. to B. or from B. to A., and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection; it was held that the tolls for goods carried the whole voyage from A. to B. are rateable in B. though in fact they are collected in a parish between A. and B.; because the tolls become due where the voyage is completed.

(a) Private act.

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exceeding four shillings, and so proportionably for every greater or less weight, or for a less distance of place, to or from which any goods &c, should be carried &c; and in case of refusal neglect or denial of payment on demand of the several rates &c, the undertakers &c, or such other persons as they should appoint respectively, should and might sue for the same by action of debt or upon the case in any court of record, or detain or make stay of any goods or any vessel carrying such goods, for which the rates and prices ought to be paid, until they were satisfied &c. By another act 7 Geo. 1. after reciting that doubts had arisen since the passing of the former act, whether the undertakers were by the said act impowered to carry the navigation further than to the end of the borough of *Newbury*, they were empowered to make the river navigable from the wharf or common landing place in at or near *Reading* to a place called the Hospital in the borough of *Newbury*, under such authorities &c as were contained in the former act. By another act 3 Geo. 2. the undertakers and proprietors were enabled to seize distrain or detain any boats in case of non-payment of the tolls, and to cause the same &c so distrained to be appraised and sold. The length of the navigation from *Reading* to *Newbury* is 18 miles and 2 furlongs; 142 yards of which are in the parish of *Newbury*, being the termination of the navigation. The navigation passes in its course through part of the respective parishes of *Newbury*, *Thatcham*, *Midgham*, *Brimpton*, *Woolbampton*, *Padworth*, *Aldermaston*, *Burghfield*, *Tilehurst*, *St. Giles*, and *St. Mary's* in *Reading*. The net amount of the tolls, arising from the tonnage upon the whole navigation, is of the annual value of 1000 *l.*; which arises as follows (*viz.*) 400 *l.* on the upward bound goods carried up from *Reading* to *Newbury*, and landed or unladen in the parish of *Newbury*; 400 *l.* on goods laden at and carried down from *Newbury* to *Reading*—and 200 *l.* on goods that pass only part of this navigation, and which never come within the parish of *Newbury*. All the tolls in respect of this navigation are collected at *Aldermaston* lock in the parish of *Padworth*, about the midway between *Newbury* and *Reading*, by the agent of *F. Page* the appellant, and have been there collected ever since the 5th. of *February* last. By the rate in question the appellant is rated to the whole amount of the tolls arising from the tonnage of goods carried on the navigation from *Reading* to *Newbury*, and landed at the basin in the parish of *Newbury*.

Bearcroft, in support of the order of session, relied on the cases of *Rex v. Cardington* (a), *Rex v. The Mayor &c. of London* (b), and *Rex v. The Undertakers of the Aire and Calder Navigation* (c), as establishing this point, that tolls are rateable to the poor in the parish where they become due, and not where they are collected. And he then observed that it appeared by this case and the acts of parliament that tolls to the annual amount of 400*l.* became due to the appellant in *Newbury*, where they were rated.

Bower, *King*, and *Blackstone*, on the same side, were stopped by the Court.

Erskine, *Milles*, and *Lane*, *contra*, contended that this question had never yet received a solemn judicial determination, whatever dicta might have been thrown out by judges in other cases. In *The Aire and Calder* case the rate was made in the place where the tolls were collected, and where, as *Buller*, J. said, they became due; denying the argument that they were due by the mile, but relying on it's being one entire contract. Now certainly the contract entered into with the proprietor under this act of parliament is very different from the contract of a common carrier. Such a person makes one entire contract, and cannot demand any thing unless the goods be delivered safe at the place of destination. Whereas the proprietor of this navigation is entitled under the act to so much *per* mile, which therefore becomes due at the end of each mile: and further he is entitled by the act to collect his tolls wherever he pleases, and consequently can enforce payment at the place so appointed by him. The *Hamptonwick* case differs materially from the present. The question there did not arise upon the rating of tolls, but of a *bargeway*, which was locally situated within the vill, and could not therefore be distinguished from any other species of corporeal tenements. In that case it was properly observed by the Court that it was immaterial whether the tolls were collected there or not; it was sufficient that they arose out of property locally situated in the vill. The case of *Rex v. Cardington* is rather in favor of the defendant than against him; for as the proprietor is at liberty to fix any place where he pleases to take the toll, and where consequently it becomes due, the lock in this case where the toll is taken is equivalent to the sluice in that case, where they were payable; and then the parish of *Newbury* have no right to assess any part of the tolls in *Newbury*. There are

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PAGE.(a) *Cowp.* 581.(b) *Ante* 21.(c) *Ante* 2 vol. 660.

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three ways, by which this property can be rated; either, first, where the tolls are collected; or 2dly, where the goods are landed; or 3dly, according to the length of the navigation in the respective parishes through which it runs. As to the first of these methods; it seems as if the act, by giving the power to the proprietor of collecting the tolls where he pleases, has thereby declared that they shall become due in such place: and according to that rule the case of *Rivers v. Page* was lately determined in the Common Pleas, where a distress at such place of collection for the whole amount of the tolls was held good, though the goods were to be sent further on. If this mode be adopted, according to *Rex v. Cardington* this rate cannot be supported. There seems to be no objection to the 3d mode of rating by the proportionable length of the navigation; for each parish through which the navigation passes is thereby deprived of the use of so much of its soil which would otherwise be rateable. It also prevents mills and other local improvements of the property. And as the bargemen on the navigation sleep in their barges at night, the intermediate parishes will be mostly burthened with the settlement of these persons; and therefore they ought to have a proportionable advantage. This shews that in justice the second mode ought to be rejected: and it would be liable to this further inconvenience that if this rule be observed in *Newbury*, it must equally be so in all the intermediate parishes, where goods may occasionally be landed; and then persons must be appointed in each of those parishes to keep separate accounts of the number of bales of goods landed in each.

Lord KENYON, Ch. J. This case does not admit of much doubt, whether it be considered on grounds of policy, on the words of this act of parliament, or on authorities. By the terms of this act of parliament a toll of 4s. per ton is imposed on all goods carried up the river *Kennet* from *Reading* to *Newbury*; that toll of 4s. is one integral toll for that integral voyage. The case states that many barges are navigated on this river; some of which perform the whole voyage up to *Newbury*, some the whole voyage down to *Reading*, and some intermediate voyages. And, in ascertaining this rate, the sessions expressly state that the rate is imposed on the appellant in respect only of the tolls which are received for goods carried up the whole navigation from *Reading* to *Newbury*. The cases, which have been cited, do not bear upon the present. In the *Hamptonwick* case, the rate was on a piece of ground adjoining the river, which

was used as a towing-path. There the Court had no difficulty in saying that the occupier ought to be rated for it, because he was in the possession of land yielding an annual profit. In *R. v. Cardington* it was stated that the tolls became due *for passing through every sluice*; that therefore was a local toll payable at the place where the sluice was erected. In the *Aire and Calder* case, no integral toll was imposed for the whole navigation, but a proportionable toll according to the distance which each vessel should go, at so much *per mile*: there, it was sufficient to say that something was due at the extreme parishes, for which the undertakers were there rateable, without entering into the quantum of the rate. It was not necessary there to determine whether any thing were due in the intermediate parishes because the tolls became due at so much *per mile*; it will be sufficient to decide that question whenever it arises. But arguments of policy and justice have been now urged; and it has been said that the tolls should be considered to be due in each parish in respect of the quantity of land occupied by the navigation: but hard would be the lot of the officers who are to make the rates in these several parishes; they would have to measure not only the length but the breadth of the navigation in each respective parish, and to ascertain with precision the exact quantity of land covered with water; those difficulties would be insuperable; and it would be in vain to think of rating at all, if such were the rule. In the case of *Putney-bridge* (a) the toll was not apportioned in respect of the quantity of land over which the turnpike road led; but the toll was collected on the spot where it was held rateable. The ground, on which my opinion proceeds, is that where a person has a valuable interest in any parish or township, he ought to contribute towards the relief of the poor in that parish in proportion to such valuable interest. Here the appellant was rated in respect of those tolls only which became due at *Newbury*, the place where the navigation finishes, and where the goods were delivered. But it is said that they were not in fact collected in *Newbury*, and that they became due where they were collected, the proprietor having power by the act of parliament of appointing the place of collection where he pleases: but certainly there is no justice in that; for the proprietor might appoint a place of collection not in any parish through which the navigation passes. What was said by my brother *Buller* in the *Hamptonwick* case, that the tolls which

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(a) *Dougl.* 305. n.

became

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became due in *Hamptonwick* could not have been rated in *London* if the corporation had chosen to receive them at *Guildhall*, is an answer to this part of the argument. And indeed it might as well be contended that an estate is rateable where the steward thought proper to receive the rents. I am therefore clearly of opinion that the justices in their sessions have done right in confirming this rate, by which the appellant is assessed only for those tolls which became due at *Newbury* in respect of the integral voyage from *Reading* to that place: but I desire that this opinion may not be applied to other cases, where the undertakers of a navigation are entitled to so much *per mile* for intermediate voyages.

ASHHURST, J. It being stated in the case that the annual value of the tolls for the whole navigation is 1000 *l.*, 400 *l.* of which arise for the entire voyage ending at *Newbury*, I have no difficulty in saying that the latter tolls become due at *Newbury* the instant the goods are landed there. Though the proprietor of this navigation may, for his own convenience, appoint any place on the side of the river to collect the tolls, and though in fact they are collected out of the parish of *Newbury*, yet they become due at the place where the goods are landed. The case of *Rivers v. Page*, which was cited, I think must have proceeded on some other ground than that stated. I do not see how the owner of the navigation could distrain for the toll till it became due; and the toll did not become due till the voyage was completed. But here I think that the appellant should be rated for 400 *l.* in *Newbury*, because tolls to that amount annually become due in that parish.

BULLER, J. Two objections have been made against this rate; if either of them be well founded, the appellant must succeed. First, that the tolls ought to be rated according to the proportion of the navigation in each parish; or, secondly, that they should be rated at *Aldermaston* where they are received, for which reason it has been argued that they become due there. But under the express words of this act of parliament the proprietor may appoint what place he chooses from time to time; and therefore it would be very inconvenient to fix that as the place in which they should be rated. The true question here is, as it was in the *Aire and Calder* navigation, where did the tolls become due? At common law there could be no doubt about this question; for if goods be not carried to the place of destination, the captain of the vessel is not entitled to any freight; for
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this reason that he has not performed his contract; he must go to the port of delivery before he is entitled to any thing. If that be so at common law, it becomes necessary to enquire whether this act of parliament has made any difference in this case. The statute gives the proprietor of the navigation a toll of 4s. *per* ton for goods carried from *Reading* to *Newbury*; and gives him the power of collecting those tolls where he pleases. But that does not alter the contract between the owner of the goods and the proprietor of the navigation. And though, according to the case of *Rivers v. Page*, the tolls may be demanded before the voyage is performed, yet if the voyage be not afterwards completed, the owner of the goods may recover back the tolls in an action for money had and received. The clause in this act enabling the proprietor to collect the tolls in any place he chooses was introduced for his benefit; but still the tolls must be demanded according to the rules of law respecting the carriage of goods from one place to another. This case falls directly within the principle of that of the *Aire and Calder*; where it was held that the tolls ought to be rated in the parish where they become due; and that is the place of delivery. In the report of that case it is stated that the undertakers were entitled to tolls "according to the distance which such goods should be carried"; that is, the whole voyage: according to my recollection the act of parliament in that case did not say that the undertakers should be entitled to so much for each mile; and though an act does mention the rate *per* mile, it is only used as the means of ascertaining what is due for the whole voyage; for the toll cannot be due till the voyage be completed.

GROSE, J. The short question is whether this property be liable to be rated in *Newbury*; which depends on this, at what place are these tolls to be considered as property; most clearly at the place where they become due, and I think they become due where the voyage is finished, for till then the carrier could not recover any thing at common law. But it has been said that a case was decided in the Common Pleas, in which it was held that a distress might be taken for tolls before the voyage is perfected: if such were that case, it must have been decided on the special provision in this act, which enables the proprietor of this navigation to collect the tolls where he pleases. But that clause did not mean to say that the tolls did not become due in law at the place where the voyage was completed, and where the goods were landed and delivered.

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The observation of my brother *Buller* is decisive on this head, that even after a distress the owner of the goods might recover back the tolls, if the voyage were not afterwards performed, and the goods delivered according to the contract. Then it was argued that the appellant should be rated for these tolls at *Aldermaston*, where they are collected: but if we should so determine this case, we should open a door to fraud; for then the proprietor would fix the place of collection in some parish where the poor-rates are the lightest, which could not be within the meaning of the act.

Order of sessions affirmed.

The KING against R. MORRIS.

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An order of justices which appointed *A.* "being a substantial householder of the parish of *B.* to be overseer of the poor for the hamlet of *C.* in the said parish," was confirmed generally at the sessions, with costs; and both those orders were affirmed here.

TWO justices in June 1791 appointed the defendant, "being a substantial householder of the parish of *Llangendeirn* in the county of *Caermarthen*, to be overseer of the poor of the hamlet of *Velindre* in the said parish;" He appealed to the next quarter sessions of *Caermarthenshire*, where the appointment was confirmed with costs, stating it to be "on the hearing of the appeal touching the appointment of *R. Morris*, as one of the overseers of the poor of the hamlet of *Velindre*, &c." To the order of sessions, returned by the *certiorari*, was annexed a rate on the inhabitants and all other substantial householders in the parish of *Llangendeirn*, towards the relief of the poor; May 16th 1791;" and, in that part of the rate, which respected *Velindre* hamlet, the appellant was rated.

Marryatt made three objections to the order of appointment. 1st. That it was an appointment of one overseer only, and could not therefore be supported, either under the 43 *Eliz. c. 2. s. 1.* which requires 4, 3, or 2, in a parish, or under the 13 & 14 *Car. 2. c. 12. s. 21.*, which directs that there shall be two or more overseers appointed in the townships or villages in those parishes which cannot reap the benefit of the 43 of *Elizabeth*. In *R. v. Harman* (a) there was an appointment of five overseers for the parish, which the Court thought could not be supported; and they said that the justices in appointing overseers should be confined to the number mentioned in the statute, 4, 3, or 2. In *R. v. Besland* (b) indeed an appointment of one overseer only was confirmed here. But in *R. v. Loxdale* (c) Lord Mansfield, speaking of *R. v. Bes-*

(a) *Bott. 6. pl. 11.*

(b) 1 *Wils. 128. & Bott. 5. pl. 10.*

(c) 1 *Burr. 446.*

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land, said "no opinion was given judicially upon the point of law;" that (a) more than four or less than two could not be appointed; and "that justices have no other power to appoint overseers but under the special authority given to them by act of parliament; therefore this special authority must be strictly pursued, and cannot be exceeded by them." And in the same case *Foster J. (b)* and *Wilmot, J. (c)*, commenting on the 39 *Eliz. c. 3.* which speaks of four overseers, said that under that statute the justices could not have appointed a smaller number than four. 2dly, This is not an appointment for a parish under the 43 *Eliz. c. 2.*, nor for a vill under 13 & 14 *Car. 2.*, but for a hamlet only, which is merely a subdivision of a parish. And it is not left to conjecture that this is not a vill or township maintaining its own poor separately from the parish at large, the rate, which is returned by the *certiorari*, purporting to be made for the whole parish, including *Velindre* hamlet. In *R. v. Severn (d)*, an appointment of overseers for "the precinct of the tower" was held bad. It was there argued that, though the precinct were not a parish, the Court might intend it to be a township or vill within the meaning of the 13 & 14 *Car. 2.*: but the Court said "As it is not expressly called a township or vill in the appointment, the Court ought (e) to intend that it is a township or vill, in order to make an appointment good which is not warranted by that statute." And they also said that both these statutes had been, and ought to be, construed strictly. But, 3dly, If the Court intend this hamlet to be a vill, the defendant should be a substantial householder in the place for which he is appointed, whereas it only appears by the appointment that he is a householder in the parish of *Llangendeirn*. In *R. v. Sherringbrook (f)* an appointment was quashed, because it did not appear by the order that the person appointed was a substantial householder. In *R. v. Curle (g)* it was held that "the words *substantial householder*, which are the words of the stat. 43 *Eliz.* must be used in an appointment of overseers of the poor." And in *R. v. Weobly (h)* an appointment was quashed, because it only described the persons appointed as substantial householders, without adding "there" or "in the parish." Besides this, one part of the order of sessions cannot be supported, for it gives

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(a) 1 *Burr.* 447.

(b) Page 450.

(c) Page 451.

(d) *Say.* 278.

(e) The word "not" must have been

omitted in the report.

(f) 2 *Lord Raym.* 1394.(g) Cited in *Say.* 279.(h) 2 *Str.* 1261.

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costs to be paid by the appellant, which is not warranted by the 43 *Eliz. c. 2.*

LORD KENYON. C. J. (stopping *Bearcroft* and *Dauncey contra.*) This Court has invariably made a distinction between orders of justices and convictions, and said that every thing is to be intended in support of the former. As to the first objection that this is only an appointment of one overseer, in support of which *R. v. Loxdale* was cited; I well remember that that case underwent a great deal of discussion in *Westminster-Hall*: to the determination of that case I subscribe my opinion, that there must be four, three, or two, overseers appointed under the stat. 43 *Eliz. c. 2.* But it never has been determined that they must be all appointed by one instrument (*a*). And here we are not left to conjecture that no other person was appointed overseer of this place; for it appears on the order of sessions that this was an appeal of "one of the overseers of *Velindre*." Then it was objected that this was not a township or vill, but only a hamlet: but "vill" and "hamlet" are in common acceptance used as synonymous terms. If indeed the justices at the sessions had stated specially in their order that this was not a vill, we should have been bound to quash the order of appointment: but as it may be a vill (*b*), we are now to intend (*c*) it for the purpose of supporting the order. The same intendment may be made as an answer to the third objection: and if we were to look at the rate, which indeed should not have been returned by the *certiorari*, the appellant there appears to be rated for property in *Velindre*. And I am glad to find that the sessions were authorised by a modern statute (*d*) to give costs.

Both orders confirmed.

(*a*) In *R. v. Besland*, as reported in *Bott.* 6. *pl.* 10. *Denison*, J. said, "There is no law, that says there shall be an appointment of two or more overseers *uno flatu*."

(*b*) *Velindre* is the *Welsh* word for vill.

(*c*) *Vid. Salk.* 501. "If a place be named generally, that place shall be taken to be, and intended, a vill."

(*d*) 17 *Geo. 2. c. 38. s. 4.*

DOUGLAS against RAY.

The venue was in London and verdict for plaintiff without defence; the verdict was set aside because only eight days notice of trial was given, the defendant residing in India.

IN this case the venue was in London; and the plaintiff, having given eight days notice of trial, obtained a verdict, no defence being made; to set aside that verdict a rule *nisi* was obtained, on the ground that ten days notice of trial should have been given, the defendant residing in India.

eight days notice of trial was given, the defendant residing in India.

Erskine, in shewing cause against this rule, relied on a case of *Kutiff v. Gascoyne* (a), where it was held that the defendant was only entitled to four days notice to plead instead of eight, because he had been arrested in *London*, though his place of residence was in *Scotland*.

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Bearcroft, in support of the rule, observed that the case cited had no application to the present; for that depended only on a rule of court, whereas the rule requiring ten days notice is founded on a positive act of parliament (b), and is applicable to all cases where the defendant resides above 40 miles from *London* or *Westminster*. And of this opinion were

The Court; who said that the words of the act of parliament were too strong to be got over; and that this very point had been determined in *Brind v. Torris*, 2 *Bl. Rep.* 1205.

Rule absolute.

(a) *Kutiff and Another v. Gascoyne*, Hil. 17 *Geo.* 3. B. R.

Cowper obtained a rule for an imparlance on the following ground, that the declaration had been delivered with an indorsement to plead in four days instead of eight. It appeared that the defendant (whose usual residence was in *Scotland*) was arrested while casually in *London*, where he put in bail.

The question was whether the rule of court *M. 10 Geo. 2.* ordering that where a defendant resides above 20 miles from

London he must have eight days time to plead, applied to this case.

Buller shewed cause, and insisted that such rule of court extended only to persons residing in *England*; otherwise it might as well be contended that it extended to *Italy* as to *Scotland*.

Lord Mansfield, Ch. J. No doubt but that it ought to be four days only; it should be deemed a residence in *London* where arrested.

Rule discharged.

(b) 14 *Geo. 2. c. 17. s. 4.*

GREENWAY against HURD.

AT the trial of this cause, for money had and received, before *Thomson*, B. at the last *Lancaster* assizes, it appeared that the action was brought to recover back 529*l.* which the plaintiff had paid in *July* 1785 to the defendant, who was a collector of excise, for certain duties on the cotton manufacture imposed by the 24 *Geo. 3. c. 40.*; which act, it was admitted, had been repealed, as far as related to these duties by the 25 *Geo. 3. c. 24.* before the duties were incurred; the latter statute repealing the duties "from and after the passing of that act," and consequently relating to the first day of the sessions, the 25th of *January* 1785. In *June* 1785 the plaintiff positively refused to pay these duties, which however he afterwards paid on the 22d of *July* following. It was objected by the defendant's counsel that, as the defendant had paid the money over to his superior officer before the action was brought, the plaintiff could

Assumpsit for money had and received does not lie against an excise officer to recover duties received by him after the act imposing them is repealed, if he have paid them over to his superior. The officer in such case is entitled to a month's notice before the action is brought by the 23 *Geo. 3. c. 70. s. 30.*

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not recover back the money from the defendant who was a public officer and who had been obliged, under the terrors of a penalty, to pay over this money; and that, if he could, the defendant was entitled to a month's notice before the action was brought, under the 23 Geo. 3. c. 70. s. 30. which had not been given; and the learned judge nonsuited the plaintiff.

A motion having been made in last *Michaelmas* term to set aside that nonsuit,

Chambre was now called upon to support his rule; and he contended that this case was not within the meaning of the 23 Geo. 3. c. 70. s. 30. which requires a month's notice, because that act only extends to actions of *tort*. The statute 24 Geo. 2. c. 44. s. 6. enacts that no action shall be brought against any constable for any thing done in obedience to a warrant of a justice of the peace until the plaintiff hath demanded a copy of the warrant &c; and that the justice shall be made a co-defendant. But it has been held that that statute does not extend to actions of *assumpsit*; and an action for money had and received having been brought against an officer, who had levied money under a conviction, which was quashed, it was decided that a demand of a copy of the warrant was not necessary. *Feltham v. Terry*, Bull. N. P. 24. Then the same construction should be put upon this statute. This indeed is a stronger case than that; for here the duties were paid not only after a repeal of the act by relation to the first day of the sessions, but after the repealing act had received the royal assent (a). The preamble to the 23 Geo. 3. c. 70. s. 30. states that the reason of inserting this clause was "to prevent vexatious suits against excise-officers acting under the authorities and powers given to them by the several statutes made for securing the duties of excise &c." But as this act was in fact repealed before the duties were paid, there was no statute in existence under colour of which the defendant could pretend to act: and even in the month of *June* preceding the payment the defendant objected to pay. The object which the Legislature had in view was to give the public officer an opportunity of tendering amends for the injury: but when the injured person waves the tort, and brings an action of *assumpsit* merely for the purpose of recovering back the money which he has paid, there is not the same reason why the officer should have notice, since he cannot tender amends.

Lord KENYON, Ch. J. (stopping *Law, contra*) The question here is not whether the plaintiff has not some remedy, but

(a) It received the royal assent the 13th of May.

whether

whether he can recover against this defendant. This in principle is like the case of *Sadler v. Evans* (a), where it was held that an action for money had and received against a known agent would not lie, but that the party must resort to the superior (b). Here the plaintiff has led the defendant into this error. If the defendant had not paid the money over, he would have subjected himself to punishment; and it would be hard that he should also be punished by an action if he did pay it over. At all events the defendant was entitled to notice. It has been frequently observed by the Courts that the notice, which is directed to be given to justices and other officers before actions are brought against them, is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it. Here the defendant acted as an officer of the excise when he received this money, and the plaintiff paid it to him in that character.

BULLER, J. said though the plaintiff objected in June to pay this money to the defendant, he seemed afterwards to waive the objection by paying it.

Per Curiam,

Rule discharged.

(a) 4 Burr. 1984.

(b) Vide *Campbell v. Hall*, Cowp. 205. where, in an action against a custom-house officer to recover back some duties, it was stated that the duties still remained in the hands of that officer with the consent of the crown officers for the purpose of trying the

question respecting the right of imposing the duties.

Law also mentioned the case of *Whitbread v. Brookbank*, Cowp. 69. where Lord Mansfield said "An action for money had and received will not lie against an excise-officer for an over payment."

EVANS against ATKINS.

THIS was an action of debt to recover a penalty of 50 l. under the 32 Geo. 2. c. 28. s. 1: 4: 12: The declaration stated that the plaintiff was arrested by the defendant, who was a sheriff's officer, on a *ca. sa.* and carried to prison within twenty-four hours after the arrest, contrary to the provisions of that statute. After a verdict for the plaintiff a motion was made in arrest of judgment; against which

Bearcroft and Wood, for the plaintiff, contended that this was a remedial law which the Court would extend as far as the words would admit of for the liberty of the subject. It was passed to prevent oppression in sheriff's officers on those who were in their custody, and therefore it applied as strongly in principle to the case of arrests in execution as on mesne process. The words too are large enough

Monday,
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A sheriff's officer is not liable to the penalties of the 32 Geo. 2. c. 28. s. 1. for carrying a person taken in execution to prison within 24 hours: that clause only relates to persons arrested on mesne process.

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to cover both. The persons mentioned in the first clause, as those who were intended to be within the protection of the act, are persons *arrested* by sheriffs officers &c. or "*being in their custody* by virtue or color of any action, writ, process, or attachment;" and then it proceeds to enact that they "shall not carry any *such* person to any gaol or prison within twenty-four hours from the time of such arrest, unless &c." Perhaps the word *arrest* would not alone have been sufficient to extend to cases of execution: but the Legislature by proceeding to use larger and more general terms must have intended to carry their meaning beyond an arrest in the first instance; and they have accordingly made the distinction by adding "or being in their custody by virtue of any action, writ, process" &c. Now that extends to executions; for all process before judgment is emphatically called *mesne* process by way of distinction. And it is palpable that the Legislature intended those words to apply to execution in the 4th clause, where they speak of persons who shall be "arrested, taken, committed, or charged *in execution by virtue of any writ, process, or action* &c." Therefore as they have used the same words in the former clause; and as the same mischief was likely to exist in both cases; there seems no reason why the words in one clause should receive a more limited construction than those in the other.

Law, and Park, contra, were stopped by the Court.

LORD KENYON, Ch. J. This point seems perfectly clear as well from the general purview of the act, as from the words of the two clauses that have been relied on. The first section prohibits sheriff's officers to carry persons arrested to prison within twenty-four hours; and the reason why they shall not be carried to prison sooner is that they may have an opportunity of procuring bail, or of agreeing with the persons at whose suits they are arrested. This therefore can only apply to those persons who are bailable. And the fourth clause shews that the Legislature knew how to describe persons in execution, and that the words used in the former section "arrested or in custody" would not extend to "persons in execution"; for these last words are ~~used in the~~ fourth clause in contradistinction to the former, and would not have been added, if the Legislature had thought that the former would have been sufficient. Therefore as well on the reason as on the fair construction of the words of the act, "the persons arrested or in custody," mentioned in the first clause, only mean persons arrested on *mesne* process: and such

such indeed has always been the opinion in *Westminster-hall* since the passing of this act.

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Rule absolute.

EVANS
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ATKINS.SOLOMONS *against* FREEMAN.Monday,
Feb. 6th.

THE declaration was delivered as of *Michaelmas* term, with notice to plead within four days of *Hilary* term; on *Saturday*, 28th of *January*, at six o'clock in the evening a plea was demanded; and on the *Monday* following, at twelve o'clock judgment was signed for want of a plea: but at two o'clock on that day the defendant pleaded the general issue. The only question was whether the defendant had till six o'clock on *Monday* to plead, or only twenty-four hours after the plea was demanded, though that time expired on a *Sunday*.

If a plea be demanded on a *Saturday*, the defendant has 24 hours to plead after the demand, exclusive of *Sunday*.

The Court were of opinion that the defendant had twenty-four hours clear after the demand of the plea, exclusive of the whole of *Sunday* (a); and they made the rule absolute for setting aside this judgment for irregularity.

Rule absolute.

Baldwin in support of the rule. *Bower*, *contrà*.

(a) If *Sunday* be the last of the four days next day. *Lee v. Carlton*, ante 3 vol. 642.
to plead in abatement, the party has till the

MUNT and Another *against* TREMAMONDO.Monday,
Feb. 6th.

THE issue in this cause was joined on the 11th of *November* last, early enough for the plaintiff to have given notice of trial for the sittings after *Michaelmas* term, the venue being in *London*: but as the plaintiff did not give notice of trial then,

If issue in a *London* cause be joined early enough in a term to enable the plaintiff to give notice of trial for the sittings after that term, the defendant is not entitled to judgment as in case of a nonsuit for not proceeding to trial, unless the plaintiff has in fact given notice of trial.

Gibbs moved in this term for judgment as in case of a nonsuit for not proceeding to trial; saying that by the practice of the Court the plaintiff was bound to go to trial at the sittings after the term in which issue was joined, if joined early enough for that purpose.

Wood, *contrà*, denied that the practice was so; and insisted that the defendant was not entitled to this rule as the plaintiff had not in fact given notice of trial in *Michaelmas* term.

The Court were of this opinion; and

Discharged the rule (a).

(a) The practice in the Common Pleas is different. *Vid. Frampton v. Payne*, H. Bl. Rep. 65.

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Monday,
Feb. 6th.DREWRY *against* TWISS and Another.

Proof that defendant's boat run down the plaintiff's in the half-way reach in the *Thames* will support an allegation, that the boat was run down in the *Thames* near the half-way reach, in an action on the case for negligence.

THIS was an action upon the case for negligence, in running down the plaintiff's boat in the river *Thames* at a certain place *near* the half-way reach. The proof was that the accident happened on the *Thames* in half-way reach. An objection was taken at the trial that there was a variance between the declaration and the proof of it, and that the plaintiff had by his own allegation made the place material: but Lord *Kenyon* suffered the cause to proceed, giving the defendants leave to move this Court to enter a non-suit, if they should be of opinion that the objection ought to prevail. A verdict was given for the plaintiff; and the defendants obtained a rule to shew cause why that verdict should not be set aside, and a non-suit entered: this rule was now opposed by

Russell, who relied on the case of "*Norfolk v. Young*. That was a special action on the case for negligently driving a cart against a post-chaise. The declaration stated that the plaintiff on &c at *Epping* in the county of *Essex* was possessed of the chaise which at the time of committing the grievance was travelling in and along the king's highway *there*; that the defendant was also then and *there* possessed of his cart, and was also then and there driving the same in and along *the said king's highway*, yet &c.; It appeared in evidence that the accident happened upon a hill going into *Colchester*, and not at *Epping*; upon which it was objected that as the fact was alleged to have happened in a highway in a particular situation, the plaintiff was bound to prove it as laid; it was likened to the ordinary case of trespass for entering a house situate &c, and then and *there* taking goods (a), where, though the latter part of the trespass be not local, yet being coupled with another cause of action which is of a local nature, namely, the trespass in the house, the plaintiff fails *in toto* if he mistake the situation of the house; the Lord Chief Baron, before whom the cause was tried, reserved the point: but on an application (b) this Court refused even a rule to shew cause why a non-suit should not be entered; saying that the action was transitory, and that the place was merely alleged as a venue." So here this action is transitory, and the words "near the half-way reach" may be rejected.

(a) *Analy v. Parkinson*, M. 32 G. 3. B. R. S. P.(b) *Mich.* 30 G. 3.

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Erskine, and *Burrough*, in support of the rule. Though perhaps the plaintiff need not have alleged that this accident happened near the half-way reach, yet having so alleged it he was bound to prove it, the allegation not being impertinent. The place is, by the manner in which the declaration is framed, interwoven with the offence itself, and cannot therefore be varied. Now the words "*near the half-way reach*" exclude the half-way reach: and if this evidence will support this averment, it would equally prove an allegation that the accident happened at any distance, *e. g.* *Gravesend*. Then suppose another action were brought by the plaintiff, alleging the accident to have happened at *Gravesend*, the recovery in this action could not be pleaded in bar to it. In an action for false imprisonment, tried some years ago before Lord *Mansfield*, the defendant pleaded that he was a constable, and had carried the plaintiff, on a specific charge, before alderman *Sainsbury*; to which the plaintiff replied *de injuriâ suâ &c.* Lord *Mansfield* held that the evidence, that the defendant had taken the plaintiff before alderman *Watson*, did not support the plea of justification. There the defendant need not have named the magistrate, it being sufficient for his purpose that he had taken the plaintiff before *a justice*, but having named one, he was bound to prove his justification as laid. So in *Savage v. Smith, Gould, J.* said (a) "If you will set forth the commencement of a public act of parliament, you must prove it, though you might have omitted it." In perjury also the same strictness is required in proving the allegations precisely, in order that the defendant may have an opportunity of pleading the matter in bar to another prosecution. And a determination in favour of the plaintiff in this case will introduce loose and useless allegations in pleadings in other cases, and will prove subversive of one of the first objects of pleading, precision.

Lord KENYON, Ch. J. This is a transitory action, and not like the case to which it was assimilated at *nisi prius*, of trespass *quare clausum fregit*, where the boundaries of the close must be proved as laid; for that action is in its nature local. If any inconvenience could arise from not allowing this objection, particularly that which was stated at the bar, that a recovery in this action could not be pleaded in bar to another, I should think the objection ought to prevail. But inasmuch as those consequences will not follow, as the objection is against the justice of

(a) 2 *Black. Rep.* 1104.

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the case, and as one of a similar nature was disallowed in *Norfolk v. Young*, I think this ought not to be allowed.

BULLER, J. This is an action upon the case for misfeasance, which is transitory in its nature. And it is material to attend to the nature of the action, in order to distinguish this case from that of *Bristow v. Wright* (a), where the plaintiff failed in proving a contract which he had stated in his declaration. A trivial variation in setting out a contract (b), a record, or any written instrument, is fatal; because it does not appear that the contract given in evidence is that on which the plaintiff declares; it is matter of description. But even in the case of perjury we all know that a trifling mistake is not fatal; as where the word "undertood" was used in the assignment of perjury instead of "understood" (c). So in another case, where "pound" was written for "pounds." In this case, the defendants were not misled by the declaration; for the gist of the offence was the defendants' having run down the plaintiff's vessel. This is not like the case of a justification to an action; for it frequently happens that the justification to an action for false imprisonment is local, because the officer can only do the act, which he attempts to justify, within particular limits; so that the action, which was in its nature transitory, becomes local by the justification; and in such a case the justification must be proved as it is laid. The argument, that a recovery in this action could not be pleaded in bar to another brought for the same cause of action, begs the question. If it were necessary for the plaintiff to prove that this accident happened *out of* half-way reach, I admit that the defendants could not plead this action in bar to another, where the act should be stated to have been done in a different place: but when it is determined that the plaintiff may recover on this evidence, it necessarily follows that the defendants may plead the recovery in this action in bar to such other; because the disallowing of this objection must proceed upon the ground of the allegation in the declaration being immaterial. The recovery in this action might be pleaded in bar to another action, by averring that the running down of the plaintiff's ship in that case was the same as that complained of in the present. I am therefore of opinion that as this is an action on the case for negligence, which is transitory, this objection ought not to prevail.

(a) *Dougl.* 665. 3d edition.

(b) *Vid. Gawinnett v. Phillips*, ante 3 vol.

643.

(c) *R. v. Beach*, *Cowp.* 229.

GROSE, J. mentioned the case of *Frith v. Gray* (a), as deciding the present.

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Rule discharged.

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(a) *Hil. 7 Geo. 3. B. R.* That was an action upon the case, upon an agreement that the defendant would procure the plaintiff a booth at the horse race on *Barnet Common*. The declaration stated that there being to be had a certain entertainment of horse racing upon *Barnet Common in the county of Middlesex*, it was agreed &c; at the trial it was proved that the whole of *Barnet Common* lay in the county of *Hertford*, and an ob-

jection was taken on the ground of this variance. But Lord *Mansfield* and the rest of the Court (on motion for a new trial) said that the gist of the agreement was the procuring the booth upon *Barnet Common*; that it was perfectly immaterial whether *Barnet Common* were in *Middlesex* or not; and therefore that those words in the declaration might be rejected.

MUNT and Another, Executors, &c. against STOKES and Another.

Tuesday,
Feb. 7th.

THIS was an action to recover 2004*l.* 3*s.* 4*d.* for money had and received by the defendants for the use of the plaintiffs as executors of *A. M'Intosh*: The defendants pleaded the general issue; and at the trial a special case was reserved, stating the following facts.

In *January 1785* the plaintiffs' testator, *Alexander M'Intosh*, was at *Calcutta* in *Bengal*, in the *East Indies*, with the ship *Huffar*, carrying *Danish* colours, whereof he was at that time master and owner. By the laws of *Denmark*, all persons, who are masters of ships belonging to *Danish* ports, and carrying the *Danish* flag, must be either natural born subjects of the kingdom of *Denmark*, or become denizens of *Denmark*, and take the oaths of allegiance to the king of *Denmark*. On the 6th of *January 1785* *M'Intosh* borrowed at *Calcutta* of the defendants (being *British* subjects) 20,000 current rupees upon the terms mentioned in the condition of a *respondentia* bond; (which was stated.) The condition (after reciting that *M'Intosh* had taken up and received of the defendants 20,000 current rupees, making 2,166*l.* 13*s.* 4*d.* to run at *respondentia* on the ship *Huffar*, of which *M'Intosh* was the commander, and her guns, arms, ammunition, stores &c, and also upon the goods and merchandizes laden and to be laden on board, during her voyage bound from *Calcutta* from out of the river *Hoogly* to the coast of *Coromandel* and thence to proceed for and arrive at *Copenhagen* in *Denmark*, being to sail on the 31st of *January* from out of the river *Hoogly*, at the rate of 10*l.* per cent. for the voyage,) was that if the *Huffar* did sail on the above voyage, and arrive at

The testator having borrowed money on a *respondentia* contract prohibited by the laws of this country, his executors the plaintiffs refunded the money to the lenders the defendants; The Court held that the executors could not maintain an action for money had and received to recover back this money, notwithstanding the defendants could not have compelled them to pay it.

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Copenhagen before the end of nine months, to be computed from the day of leaving *Calcutta*, when also the risk of the *respondentia* lender commenced; and if *M'Intosh*, his heirs, executors &c. before the end of nine months &c. paid to the defendants &c. the principal sum of 2,166*l.* 13*s.* 4*d.* in *London*, together with the premium of 10*l.* *per cent.* for the voyage, if the same were performed within nine months &c., and if any longer *pro rata*, in consideration of which premium the usual risk of rivers, violence of the seas &c., was to be on account of the defendants, and in case of the loss of the ship *M'Intosh*, his heirs, executors &c., did within six months next after such loss, or as soon after as such average should be ascertained, pay to the defendants such average or proportion as by custom should become due on the salvage, then the obligation was to be void. *A. M'Intosh* soon afterwards sailed in the ship, the *Huffar*, with *Danish* colours from *Calcutta* to the coast of *Coromandel*, and there took goods on board, and from thence sailed for *Copenhagen*. In *December* 1785, *A. M'Intosh* died, having first made his will, and appointed the plaintiffs and four others executors. The plaintiffs alone proved the will in the prerogative court of *Canterbury*. On 12th *October* 1786 the plaintiffs, upon application to them by the defendants, paid to the defendants 2004*l.* 3*s.* 4*d.* in discharge of the bond so entered into by *M'Intosh*.

Romilly, for the plaintiffs, made three points; 1st, The defendants could not have recovered this money on the bond, either from the plaintiffs, or their testator; the transaction being void by stat. 7 *Geo.* 1. c. 21. *f.* 2.; and 21 *Geo.* 3. c. 65. *f.* 29. (which was admitted.) 2dly, The plaintiffs, having paid it, are entitled to recover it back. In all cases, except two, where a party has paid money under a mistake, either of fact or of law, he may recover it back again in an action for money had and received, *Farmer v. Arundell*, 2 *Bl. Rep.* 824. The two excepted cases are, 1st, where he was bound in conscience, though not in law, to make the payment; 2dly, where he is *particeps criminis*. But this case does not fall within either of those exceptions. The plaintiffs who are executors were not bound in conscience to complete an agreement made in violation of law, and to pay this money; for it will not be allowed to them in the distribution of assets; and they could not give this payment in evidence under the plea of *plenè administraverunt*. They were not only not parties to the original agreement, but they could not

not possibly be benefited by it in any event, since they are either trustees for the creditors of the testator or for the legatees. Neither does this case come within the other exception; for these plaintiffs, not being parties to the original contract, cannot be said to be *participes criminis*. And the maxim *potior est conditio possidentis* is never applied but when the parties are in *pari delicto*. The Courts have even gone so far in the application of this principle as to discriminate between the different degrees of guilt; and they have held that money paid for insuring tickets in the lottery may be recovered back from the office-keeper (a), because the Legislature considered the insurer as more culpable than the insured, but that money paid by the lottery-office-keeper, in consequence of having insured tickets, cannot (b); and in both those cases is the transaction prohibited by statute. It must be admitted indeed that, if the testator had paid this money, the executors could not have recovered it back, because they must have claimed it as money had and received to the testator's use, and then the case would have come within both these exceptions. But as between these parties, it will be a case of greater hardship on the plaintiffs if they cannot recover, than on the defendants if they should be compelled to refund; because the plaintiffs cannot retain the money out of the testator's assets, but the loss must be borne by the plaintiffs individually who are perfectly innocent, whereas the defendants were parties to the illegal contract. 3dly, If then the plaintiffs be intitled, they may recover in this form of action. The addition of *executors* in the declaration is merely description; the plaintiffs might have declared in their own right; and the allegation of their being executors may be rejected as surplusage; for it will not protect them from paying costs in the event of the defendants succeeding. 1 *Ld. Raym.* 436. 2 *Ld. Raym.* 1215. *Smith v. Barrow*, ante 2 vol. 476. and *Cockrill v. Kynaston*, ante 277. Nor is it any objection in this stage of the cause that the action is not brought by all the executors, for that was the subject of a plea in abatement.

Lord KENYON, Ch. J. (stopping *Law contra*). It has been said that this was not a debt which the plaintiffs were bound in conscience to pay to the defendants: but I think that they were bound both in honor and conscience to refund the money which the defendants had advanced, though the original contract were contrary to a positive law; for this is not a penalty, but money

(a) *Jaques v. Golightly*, 2 *Bl. Rep.* 1073. |
and *Jaques v. Wisby*, *H. Bl. Rep.* C. B. 65.

(b) *Browning v. Morris*, *Cowp.* 790.

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which the defendants had actually advanced. And the original contract was not *malum in se*, but *malum prohibitum*. Though the security, on which this money was borrowed, was void by the statute, I do not know but that an action for money had and received might have been maintained by the defendants to recover back this money: the cases cited relative to premiums go a great way to shew that. But the ground on which I go is this, that there was no misrepresentation, or any improper conduct by the defendants to extort the money from the plaintiffs; but the plaintiffs, knowing the whole transaction, and the law also, as they were bound to know, voluntarily paid it. There was nothing contrary to conscience in the defendants receiving the money, which they had advanced; the plaintiffs therefore are not entitled either in law or in equity to recover it back again. This is not like a case which I remember many years ago, where an action was brought to recover the excess of a copyhold fine; there it was held that the money might be recovered back in an action for money had and received against the steward, because he had used coercion to obtain payment of the excessive fine; he would not deliver the title deeds without. Nor is this a case of singular hardship against the executors; for where executors pay a debt of an inferior nature, though conscientiously and without any view to prefer one creditor to another, the loss must be borne by them individually, if the assets be insufficient to pay all the debts of a higher nature. Without going into the question of form, upon which I should be sorry to have the case decided, I am clearly of opinion that on the merits the plaintiffs are not entitled to recover.

BULLER, J. In the case of illegal contracts, one party cannot recover against the other on the contract itself: but if he come to rescind the contract, he may recover back so much money as has been paid. This was established in *Jaques v. Golightly*, and in *Lowry v. Bourdieu* (a). If the party come into a court of justice to enforce an illegal contract, two answers may be given to his demand; the one, that he must draw justice from a pure fountain, and the other, that *potior est conditio possidentis*. Such would have been this case if the plaintiffs had not paid the money, and an action had been brought on the contract: but, the plaintiffs having paid it, the question is whether the defendants retain the money against conscience; I think they do not, because they have only received back the money which they had before ad-

(a) *Dougl.* 468. 3d. edit.

vanced to the plaintiffs' testator. I also think that the point of form is against the plaintiffs; they should have declared in their own right, and not as executors. At all events if the action be brought by the executors, all of them should have joined; and this is a defect in the plaintiffs' title. Where indeed several are named executors, and one only proves the will and acts, that one is liable to an action; but he cannot sue alone until the others have released.

Postea to the defendants.

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against
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GORTON and Another against FALKNER.

Tuesday,
Feb. 7th.

IN trover for three looms, for weaving small wares, a special case was reserved. The plaintiffs, being manufacturers of small wares at *Manchester*, employed one *R. Minikin*, as a small ware weaver there, to make linen and cotton tapes for them; and for that purpose in *August* last lent him two looms, one for himself, and the other for his wife, to weave upon; and afterwards in *October* last on application by *Minikin* lent him another loom. *Minikin* and his wife worked upon two of the looms, and *Boardman* (*Minikin's* journeyman) had been seen to work on one of them. The looms were used and worked upon in a part of a house in which *Minikin* resided at *Manchester*, which was let to him by the defendant. For the use of the looms *Minikin* was not to pay the plaintiffs any thing, but he was to work for the plaintiffs only. The case also stated that it is customary at *Manchester* for persons in the small ware trade to lend their workmen looms to weave upon, without receiving any thing for the use of such as are for weaving linen or cotton tapes; but it is common for workmen to pay for the hire of such as are for weaving worsted tapes; and all the looms in question were for weaving linen and cotton tapes. *Minikin* being tenant to the defendant of part of his house, and rent being due for the same, the defendant distrained the looms, so lent to *Minikin* by the plaintiffs, for rent, upon the premises; and afterwards, according to the statute, appraised and sold the same. At the time of the distress there were no other goods upon the premises.

Implements
of trade may
be distrained
for rent, if
they be not
in actual use
at the time,
and if there
be no other
sufficient dis-
tress on the
premises.

S. Heywood for the plaintiffs. A point was made below, but which will not perhaps be insisted on now, that since the stat. 2 W. & M. c. 5, all goods are liable to distress for rent, on the ground that a distress must now be considered as a statute execution: but in answer it may be observed that that statute only

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extended the remedy, and enabled the landlord to distrain those things which before were liable to a distress, but did not subject every moveable chattel indiscriminately to a distress for rent. If that ground be abandoned by the defendant, the plaintiffs are entitled to recover, whether the looms be considered as the property of the tenant himself or of the plaintiffs. Considered in the first point of view, utensils of trade are privileged from distress by the common law. Originally nothing could be distrained for rent but what made part of or took the profits of the land. *Fitz. Abr. "Avowrie" pl. 216.* Beasts of the plough were also exempt, if there were any thing else liable to the distress. *Co. Lit. 47. a. Dy. 312. marg.* This was also enacted by 51 *Hen. 3. ft. 4.*; which statute Lord Coke observed was confirmatory of the common law. 2 *Inst. 132.* And though the rigor of the ancient law has been in some degree relaxed in this respect, and though, generally speaking, all moveable chattels may now be distrained, whether they partake of the profits of the soil or not, yet certain things have always been considered as privileged, among which are utensils or instruments of trade, because it is for the benefit of trade and for the public good that they should be protected. *Co. Lit. 47. a.* So a mill-stone in a mill, and an anvil in the smith's shop, are privileged, though the anvil be removed out of the stock, or the mill-stone out of the mill to be picked. 14 *Hen. 8. 26.* These looms were equally protected from a distress for rent, if they be considered as the property of the plaintiffs. They were lent to the workmen to enable them to work up certain goods for the plaintiffs: and all the reasons urged on the former ground are equally applicable to this; it is for the benefit of trade that implements of trade, thus lent to workmen, should be privileged from distress for rent; and therefore this comes within the allowed exemption. In *Francis v. Wyatt (a)*, A carriage standing at livery was held liable to a distress for rent, because it was part of the profits of the premises. But that reason does not hold in this case. And the exemption depends on the nature of the goods themselves, and not on the place where they are found. *Rede v. Burley, Cro. Eliz. 596.* and *Gisbourn v. Hurst, Salk. 249.*

Holroyd, contra, was stopped by the Court.

Lord KENYON, Ch. J. It is not necessary in this case to decide the question which (it was said) was intended to be raised on the construction of the statute of *William & Mary*, because there are

(a) 1 *Bl. Rep. 493.* and 3 *Burr. 1498.*

other

other grounds here to warrant us in determining that the distress was properly taken. It will be sufficient to decide that case whenever it shall arise: but I cannot refrain from observing, as it strikes me at present, that that act of parliament has not taken away all privileges from distress, but has merely given the power of selling those things which might have been distrained before. This case might have been stated more explicitly, particularly if the looms were in actual use at the time of the distress: however we must now decide on the case as it is sent to us. We may lay it down as a general proposition that at this time all moveable chattels are distrainable, whatever may have been said in ancient times to restrain the distress to those things which partook of the profits of the soil: now, not only living animals, but also inanimate things, may be distrained. But to this general proposition there are several exceptions; some things are exempt from being distrained on account of the place, and others on account of the things themselves. The anvil in the smith's shop, and the mill-stone, are privileged, because they are affixed to the freehold; and a temporary removal of the one or the other for the purpose stated in the argument is not sufficient to destroy that privilege. In the case of *Francis v. Wyatt* the question was whether a livery-stable had the same privilege as a common inn, so as to protect a carriage standing at livery; the Court thought that the same reason did not exist in both cases, and therefore that the privilege of the common inn should not be extended to a livery stable. There are several other exemptions, which it is not necessary to state particularly; they are all collected in 3 *Com. Dig.* 112, 113; from whence it appears that utensils of trade are not liable to be distrained while they are in actual use; one of the instances given is that of an axe in a carpenter's hand; and this exemption is founded on good sense; it is allowed not only for the convenience of trade, but for the preservation of the peace. *Averia caruæ* are also privileged, provided there be other sufficient distress; but if not, they may be distrained. Now in this case it is not stated that these looms were in actual use at the time of the distress, though they *had been* used and worked upon, which is too loose and indefinite a finding to warrant us in supposing that they were then in use; and it is stated that there were no other goods upon the premises liable to the distress. Therefore I am of opinion that the distress was properly made.

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ASHHURST, J. It is a general principle that all chattels found in a person's house are liable to be distrained by the landlord; It is true indeed that there are some exceptions to the general rule, but this case does not come within either of those exceptions. The foundation of this principle is that, as the landlord is supposed to give credit to a visible stock on the premises, he ought to have recourse to every thing which he finds there. Now it does not appear from the facts stated in this case that the looms were privileged from a distress. It is not found that they were in work at the time of the distress; but it is stated that there were no other goods liable to be distrained: And it is a general rule that implements of trade may be distrained, if there be no other goods subject to a distress.

BULLER, J. Whether goods be the property of the tenant or a stranger is perfectly immaterial, provided they be on the premises, and be not privileged by law from a distress. The question therefore is whether these goods, which were on the premises, be privileged by law from being distrained. When this case was set down for argument before (a), I alluded to a case in the common pleas, which goes the whole length of deciding the present. That was the case of *Simson v. Harcourt*; and it is of great authority, because it was twice argued at the bar, and Lord Ch. J. *Willes* took infinite pains to trace with accuracy those things which are privileged from distress. It was argued the first time in *Hil. 15 Geo. 2.*; the second in *17 Geo. 2.*; and judgment was not given till *Mic. 18 Geo. 2.* (Mr. J. Buller here read the following note of Lord Ch. J. *Willes's* judgment. "*Simson v. Harcourt, Mic. 18 Geo. 2.* This was an action of trover for a stocking loom. The defendant pleaded not guilty: This cause was tried at *Leicester* assizes, and a special verdict to the effect following. That the plaintiff was possessed of a stocking-frame of the value of 8*l.* which he let to *John Armstrong* at 9*d.* per week; that *Armstrong* was by trade a stocking-weaver. That *Armstrong* was indebted to the defendant in 53*l.* for rent, and that, no other sufficient distress being on the premises, the defendant distrained this stocking-frame for the rent in arrear at a time when *Armstrong's* apprentice was using the same; and the jury submit to the court if &c. 1st, Whether a stocking-frame has any privilege at all from being distrained. 2^{dly}, If

(a) This case was to have been argued in last Michaelmas term, but the Court wished to have it more fully stated; but the parties, not agreeing as to the facts to be introduced, desired to take the opinion of the Court on the case as it was originally stated.

it have, whether it may not be distrained, when there is no other sufficient distress to be found. 3dly, Whether or not (when no sufficient distress is to be found) it be privileged by being in actual use. There are five things which by the common law are not distrainable, 1st, Things annexed to the freehold. 2d, Things delivered to persons exercising their trade, as cloth in a taylor's shop. 3d, Hops and corn. 4th, Instruments of the plough. 5th, Instruments of trade. The three first were absolutely privileged; the two last only *sub modo*. As to the 1st, they are not distrainable at this day; nor was corn distrainable before the statute of *W. & M.*; and the reason was because they could not be restored in the same plight they were in when taken. Beasts of the plough were not distrainable, in favour of husbandry, which is for the general good of the nation; and if they were distrained, the means of a person's livelihood would be taken away, which last reason holds for instruments of trade, *Co. Lit.* 47. *a. b.* This frame is certainly an instrument of trade. And we are of opinion that it may be distrained when no other distress is to be found. This puts an end to the two first questions. The 3d is the only material one; and we are of opinion that this stocking-frame was not distrainable though in actual use, because it could not be restored in the same plight, for the stocking then weaving must necessarily be damnified; another reason is because when it is in the custody of any person in actual use, it cannot be taken away without a breach of the peace. 1 *Inst.* 47. *a.* There is a plain distinction in *Brañton*, and all the books, between *catalla otiosa*, and those in actual use. 14 *H.* 8. *pl.* 6. *Cro. El.* 549. *Moore* 214. There is but one case which looks the contrary way (*viz.*) 1 *Sid.* 440. and even there a *quære* is made; and I am far from thinking that case to be law. For these reasons let the plaintiff have judgment.") Now the present case falls within the fifth class, which Ch. Justice *Willes* said was only privileged *sub modo*; they are only under the same protection as *averia caruæ*. The point in that case was that the frame could not be distrained, because it was in actual use at the time: And for the reason now given by Lord *Kenyon*, a distress could not be made under such circumstances without a breach of the peace. As therefore the looms in this case were not in actual use at the time of the distress, I am of opinion that the plaintiffs are not entitled to recover.

GROSE, J. In 1 *Inst.* 47. utensils of trade are classed together with *averia caruæ*: with respect to the latter, all the old autho-

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rities agree in saying that they are only privileged from distress in case there are other goods liable to be distrained. 2 *Inst.* 132.

Then, implements of trade being put on the same footing are entitled only to the same partial exemption.

Postea to the Defendant.

Wednesday,
Feb. 8th.

A defendant may be held to special bail in an action on a judgment, for 10*l.* for damages and costs; though the original debt alone were under 10*l.*

LEWIS against POTTLE.

THE debt in a former action between these parties was under 10*l.*; but being encreased by the costs in that action, in which the plaintiff recovered, the defendant was held to bail in an action brought on that judgment. And in the last term

Lens obtained a rule to shew cause why he should not be discharged on filing common bail; on these authorities, *Palmer v. Needham*, 3 *Burr.* 1389; *Belither v. Gibbs*, 4 *Burr.* 2117; *Busb v. Bates*, 5 *Burr.* 2660; and an anonymous case in *Cowp.* 128.

Marryatt shewed cause against this rule, and said that a contrary rule was established in *Nightingale v. Nightingale*, in the common pleas; 2 *Bl. Rep.* 1274.

Lord KENYON, Ch. J. then said that as a different practice had prevailed in the different courts, it was proper that a conference should be had with the judges of the common pleas, in order to make the practice in future uniform. And accordingly, on this day, he said that the judges of this court had consulted with those of the common pleas, and that the result of it was that they had agreed to conform to the practice of the other court, by which a person under similar circumstances with the defendant may be held to special bail. And they

Discharged the Rule.

UTTERSON against VERNON and Others, Assignees
of ELIZABETH TYLER, a Bankrupt.

Wednesday,
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If *A.* lend stock to *B.* to be replaced as stock, without naming any particular day, and *B.* become

a bankrupt before any request by *A.* to replace the stock, *A.* cannot come in under *B.*'s commission.

THE Lord Chancellor entertaining some doubts about the determination of this case (*Vid. ante* 3 vol. 539.) desired that it might be sent here again to be reconsidered: it was accordingly put in the shape of a feigned issue, and a special verdict was taken by consent, stating the same facts, in substance,

as before. The verdict was twice (a) argued here, and the question was reconsidered by the Court, whose unanimous opinion was now delivered by

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Lord KENYON, Ch. J. The question is whether the plaintiff, who lent his stock to Mrs. Tyler, on her engaging to replace it generally, could be considered as a creditor for any and what sum of money previous to Mrs. Tyler's bankruptcy, she not having replaced it before that time. On a former occasion there was a difference of opinion on the bench; a majority of us thinking that the plaintiff was entitled to recover: but the Lord Chancellor, wishing to have the case reconsidered, sent it back again for that purpose. Most certainly it is never too late to correct an error in the administration of justice; and I am very glad that this case has been returned to us, because, on further consideration, we are all of opinion that the former determination cannot be supported. The question in this case depends on a simple principle of law, which cannot be doubted. It is clear that where one person, previous to his bankruptcy, is indebted to another in a precise sum which is ascertained, the latter may prove his debt under the commission: but it is as clear that where there is only a cause of action existing, where the debt is to arise on a stipulation which has not been broken previous to the time of the bankruptcy, and where the debt remains to be enquired into, there the creditor cannot prove his debt under the commission, and the demand will remain undischarged by the certificate.

The circumstance which had too great an effect on our minds on the former occasion was the extreme hardship of the case; for it appeared hard that the plaintiff, who had advanced this money to the bankrupt, and which constituted a considerable part of her fund to be distributed among her creditors, should be himself excluded from receiving any proportion of this fund in satisfaction of his own debt. We also laid too great a stress on the case of *Dutch v. Warren*, reported by Sir John Strange (b), but better reported in the case of *Moses v. Macferlane* (c); for there is a material distinction between that case and the present. There the party was to replace the stock on a day fixed, namely, on the opening of the books; and that day being passed the debt arose. But here the stock was to be replaced at the request

(a) In *Hil.* 31 *Geo.* 3. by *Baldwin* for plaintiff, and *Erskine* for the defendants.
the plaintiff, and *Bower* for the defendants; (b) 1 *Str.* 406.
and in *Trin.* 31 *Geo.* 3. by *Bearcroft* for the (c) 2 *Burr.* 1010, 1011.

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of the plaintiff who lent the stock, and no such requisition having been made previous to the bankruptcy, no certain debt arose, but it rested altogether in damages to be ascertained by a jury.

On this short ground therefore, at the same time referring to the opinion delivered by my brother *Asbburst* on the former occasion, we are all of opinion that judgment should be given for the defendants.

Judgment for the defendants.

Wednesday,
Feb. 8th.

The KING against J. POWELL.

The owner of a cart, who does not reside within the bills of mortality or within five miles of *Temple Bar*, need not enter his name and place of abode with the commissioners of hackney coaches, or have his name or any number upon the cart, though it be driven within those limits.

THIS was a conviction on the stat. 24 Geo. 3. sess. 2. c. 27. s. 8. The information stated that on the 4th of *October* 1791 the defendant residing at *Parson's Green* in the county of *Middlesex*, farmer, was the owner of a certain cart, which was on that day driven within five miles of *Temple Bar*, (that is to say) in a certain place called *Old Street*, which is in the parish of *Saint Luke* in the county of *Middlesex*, and also within the jurisdiction of the justice (convicting;) the defendant not having entered his name and place of abode with the commissioners for licensing hackney coaches, and not having upon some conspicuous part of such cart the number of the cart &c, but on the contrary thereof having neglected so to do &c, contrary to the form of the statute &c; Whereby and by force of the statute, &c he had forfeited for his said offence 40s.; one moiety thereof to the use of the poor of the said parish of *Saint Luke*, the parish where the offence was committed, and the other moiety to the use of *Thomas Prior* the informer. The defendant appeared before the justice on a summons; when the facts contained in the information were proved; and it appeared by the evidence (the whole of which was set out *verbatim* in the conviction) that *Parson's Green*, the defendant's place of residence, was more than five miles distant from *Temple Bar*, and was not within the bills of mortality. The judgment was as follows; "Therefore it is considered and adjudged by me the said justice that the said *John Powell* by the oath of, &c. is and be convicted of the offence so as aforesaid charged upon him in and by the said information, according to the form of the statute &c. And I the said justice do award and adjudge that the said *J. Powell* hath for his said offence forfeited and do pay the sum of

"of 40s. to be distributed and applied, &c," [as in the information].

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Erskine and *Garrow*, in support of the conviction, contended that every person, without regard to the place of his residence, was bound to put his name and a number on his cart, if it were driven within the bills of mortality, or within the distance of five miles from *Temple Bar*. The first statute on this subject is the 18 *Geo. 2. c. 33*; by the fourth section of which, after reciting the inconveniences arising from the irregular behaviour of the carmen &c, driving carts &c within the cities of *London* and *Westminster*, and the suburbs thereof, and other streets within the bills of mortality, it is enacted that no person shall drive any cart &c within those limits, unless the owner shall place upon some conspicuous part of it his name and the number of such cart &c. The fifth section enacts that every owner, residing within those limits, shall enter his name and place of abode with the commissioners of hackney coaches; and the sixth inflicts a penalty of 40s. on the driver within the limits, if the cart be not marked, numbered, and entered. The statute 30 *Geo. 2. c. 22. s. 1.* directs that a moiety of the above forfeiture shall be paid to the informer, and the other moiety to the poor of the parish where the offence is committed. Then came the statute in question; which recites a doubt, "whether under and by virtue of any of the laws now in being the owners of any carts &c belonging to persons residing out of the bills of mortality, although within the adjoining places of the cities of *London* and *Westminster*, and the borough of *Southwark*, ought to enter their names and places of abode with the commissioners for licensing hackney coaches"; and then it enacts "that no person shall drive any cart &c, within the cities of *London* or *Westminster* and suburbs thereof, the borough of *Southwark*, and other streets and places within the bills of mortality, or five miles of *Temple Bar*, except the owner of such cart &c shall have entered his name and place of abode with the commissioners for licensing hackney coaches, and shall upon some conspicuous part of such cart have the name of the owner of such cart &c, and the number of such cart &c, in order that the driver of such cart may be the more easily convicted for any misbehaviour &c; and in case of such neglect &c, the owner, or driver, of such cart so residing and driven within five miles of *Temple Bar* shall be subject to all the penalties and forfeitures created by any laws now

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in being relative to such owners (a) or drivers of carts &c within the said cities of *London* or *Westminster*, and suburbs thereof, the borough of *Southwark*, and other streets within the bills of mortality; *which shall or may be recovered and applied in such manner as forfeitures and penalties are by law now recoverable from the OWNERS (b) of such carts &c so driven within the said cities of London or Westminster*, and suburbs thereof, the borough of *Southwark*, and other streets within the bills of mortality. It is not necessary to contend that it was incumbent on the defendant to enter his name and place of abode with the commissioners of hackney coaches, it being sufficient for this purpose that his cart was driven within the limits specified in the acts, not having his name, and any number upon the cart which are required upon all carts driven within these limits, without regard to the residence of the owner. The mischief to be remedied was the irregular behaviour of persons driving carts in *London* &c; and that mischief is as likely to happen when the cart is driven within those limits, whether the owner live at a distance from *London* or in it. And though the information charges the defendant with not having entered his name with the commissioners of hackney coaches, as well as with not having his name and number on the cart, yet if he be guilty of the latter offence, he is equally liable to the penalty of 40s.; and only one penalty is adjudged by the magistrate.

Baldwin, contra, insisted that only those owners of carts, who resided within the given limits, were liable to the forfeiture. If it were not necessary for the defendant to enter his name and place of abode with the commissioners of hackney coaches, (which seems to be admitted,) neither was it necessary for him to have his name or any number on the cart. They are both required for the same purpose, that in case of any disorderly behaviour in the driver any informer may know where to apply for redress. The name of the owner with his place of abode is directed to be registered with the commissioners of hackney coaches, that they may know where to find him, and they give him the number which he is to affix on his cart: but if the owner were to put any arbitrary number of his own upon his cart, it would convey no information to those who

(a) It does not appear that the owners are liable to any penalty by any prior statute.

(b) If there be no penalty upon the owners in any former act, it seems doubtful whether the penalties of this act can be recovered

against them; as these penalties are directed "to be recovered and applied in such manner as forfeitures and penalties are by law now recoverable from the owners of such carts so driven &c."

fought

sought it, neither would the name of the owner upon the cart lead to a discovery of his place of abode. It is only therefore in those cases, where the name and place of abode are to be registered with the commissioners, that it is necessary that the name and the number should be put upon the cart; for the commissioners give that number. That no penalty is inflicted on persons who reside out of these limits is clear from an attentive perusal of the words of the 24 Geo. 3. s. 2. c. 27. s. 8. The enacting part is "that no person shall drive any cart, &c." within the cities of *London* or *Westminster* and suburbs thereof, the borough of *Southwark*, and other streets and places within the bills of mortality, or five miles of *Temple Bar*", except the owner &c.; and then, in order to affect the owner, it proceeds, "And in case of such neglect or refusal of entry, and affixing such number on such carts &c. the owner or driver of such cart &c. so residing and driven, &c. shall be subject &c."; which means not only that the cart must be driven, but also that the owner must reside, within these limits; for "residing" must refer to "owner, and "driven" to "cart." If this defendant be liable, the act may be equally extended to persons residing at a distant part of the kingdom, whose carts may occasionally come to *London*. The doubt recited in the 24 Geo. 3. was whether persons living in the environs of *London*, though out of the bills of mortality, were liable to the penalties of the former act; for even some part of *Oxford Street* is not within the bills of mortality; it was therefore to remove all difficulties about the distance that this section was introduced, by which persons residing within five miles of *Temple Bar* are subjected to the penalties of the act, though they do not live within the bills of mortality. But if there be any doubt upon the true construction of the act, as it is admitted that the defendant need not have registered his name with the commissioners of hackney coaches, this conviction cannot be supported, because it is for that neglect as well as for neglecting to have any name or number upon the cart. The information charges both; and the judgment applies to both: he is "convicted of the offence so as aforesaid charged upon him in and by the said information, &c."

LORD KENYON. Ch. J. The eighth section of the statute 24 Geo. 3. c. 27. is very inaccurately penned; but I think that the penalties inflicted by it do not extend to this defendant. The stat. 18 Geo. 2. only respects persons who drive carts within the cities of *London* and *Westminster*, and the suburbs thereof, and other streets within the bills of mortality: for that class of persons

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certain regulations are prescribed; the act requires that the name of the owner and the number shall be placed on some conspicuous part of the cart, and that the *owners residing within those limits* shall enter their names with the commissioners of hackney coaches. The numbers which the act directs shall be put upon the carts are such as the commissioners of hackney coaches direct; they go on progressively. But the Legislature afterwards thought that the limits, described in this act, were not sufficiently extensive; and they wished to extend the regulations of the former act to a larger class of persons; namely, those owners of carts who live within five miles of *Temple Bar*, though not within the bills of mortality. The 24 *Geo. 3. st. 2. c. 27. s. 8.* recites a doubt whether the owners of carts, residing out of the bills of mortality though in places adjoining to the metropolis, were bound to enter their names and places of abode with the commissioners of hackney coaches; and then it proceeds to enact that no person shall drive any cart within the limits mentioned in the former act, or within five miles of *Temple Bar*, unless the owner shall have entered his name and place of abode with the commissioners of hackney coaches, and shall have his name and the number of the cart upon some conspicuous part of it. If the act had stopped there, however inconvenient it might have been to persons residing at a great distance from *London*, we should have been bound to say that all owners indifferently (without any regard to the place of their residence) were to comply with the requisitions of the act, if their carts were accidentally driven within any of these limits: but the act proceeds further, and adds other words, which are sufficient to restrain the operation of the former ones to persons residing within those limits; "And in case of such neglect, the owner of such cart so residing and driven within five miles of *Temple Bar* &c." This sentence is not grammatically expressed; but it refers only to persons who reside within the given limits. Then the evidence given in support of this conviction shews that the defendant is not liable to the penalties of the act; for it states that he lives at *Parson's Green*, which is not within five miles of *Temple Bar*. I am therefore of opinion that the magistrate had no jurisdiction in this case, and that the conviction should be quashed.

ASHHURST, J. The mischief, which the Legislature wished to remedy, is the improper behaviour of persons driving carts in *London* or the adjoining places. That mischief does not depend upon the place of residence of the owner of the cart; for it is as much to be apprehended when the owner lives at a distance as

when he resides in *London*. However the Legislature in that clause in the 24 *Geo. 3.* which creates the forfeiture as against the owner, confines the operation of the act to persons residing within the limits before described. And, as this defendant does not live within those limits, he is not liable to the penalties of the act.

Per Curiam (a), Conviction quashed.

(a) *Abf. Buller, J. and Grose, J.*

GOODWIN *qui tam* against **PARRY**.

The same, against **SMITH**, and also against Two Others.

IN consequence of the decision in *King q. t. v. Smith (a)*, many actions were brought against the different printers of the newspapers for publishing illegal lottery schemes. The present plaintiff filed one affidavit in order to hold the four defendants to bail, and afterwards sued out one writ against them all, but he declared against them severally as for separate offences. Upon which the defendants obtained a rule to shew cause why the writ should not be quashed, because the affidavit, which is the first step to be taken under the 27 *Geo. 3. c. 1. s. 2.*, and without which the writ cannot be sued out, cannot be supported. The objection to the affidavit was that each defendant was obliged to take a copy of the *whole*, whereas three fourths of it do not relate to him; and that the office copy was necessarily stamped with four stamps, when one only would have been sufficient if the affidavit had affected only one defendant. And the case of *King q. t. v. Horne (b)*, was relied upon.

Cause was now shewn by saying that whatever irregularity there might have been, the defendants had waved taking advantage of it by putting in bail. That even if they had not, and the affidavit were bad, the plaintiff might sue for the penalties without holding the defendants to bail, and that the plaintiff would now consent to accept common bail. And that the circumstance of including four persons in one writ was no objection to the writ itself; for that, the writ being merely process to bring the defendants into court, the plaintiff was at liberty to declare against them separately. And they added that this case did not come within the 27 *Geo. 3. c. 1.*, it being an action

(a) *Ante 414.*

(b) *Ante 349.*

1792.

The KING
against
J. POWELL.

Wednesday.
Feb. 8th.

Where several persons have separately incurred penalties for printing illegal schemes of the lottery a separate affidavit must be made and filed against each of them, and if they be all joined in one affidavit, the irregularity is not waved by their putting in bail; but the Court on motion will stay the proceedings against all of them.

1792.

GOODWIN
qui tam
against
PARRY.

against a printer for printing illegal schemes, and not for making those illegal schemes, or for insuring.

Per Curiam. This case undoubtedly comes within the statute 27 Geo. 3. c. 1., which speaks of such penalties against certain former acts (of which the 22 Geo. 2. c. 28. creating the forfeitures against the printers of illegal schemes is one) as *touch and concern lotteries*. If so, it was necessary that there should be an affidavit previous to the suing out of the writ. And this affidavit cannot be supported for the reasons urged by the defendants' counsel; they are not to be harrassed with the unnecessary expence of taking copies of those parts of the affidavits, which relate to offences not imputed to them individually. From this it necessarily follows that the writ must be quashed, because the words of the act of parliament are positive that no process shall be sued out until an affidavit has been first duly made and filed. And though in ordinary cases a party may wave taking advantage of any trifling irregularity in the mode of proceeding by not objecting in the first instance, the defendants in this case could not wave this objection, because the Court are to take care that an action on a penal statute shall not be commenced in a mode prohibited by that statute.

Rule absolute.

Saturday,
Feb. 11th.

VENN against CALVERT.

If a plea be
filed before
the bail are
perfected,
it is a nulli-
ty, and does
not become
a good plea
by perfecting
the bail af-
terwards.

IN this case the declaration was delivered *de bene esse*, and the plea was filed before the bail were perfected; after the bail had justified, the plaintiff signed judgment as for want of a plea.

Baldwin obtained a rule to set aside this judgment, because a plea was filed at the time when the judgment was signed.

Shepherd shewed cause against this rule; contending that the defendant was not intitled to take any step in the cause till he had justified bail; and that the plea which was filed before that time was a nullity. And he cited *Cook v. Raven* (a), where it was held that a demand of a plea before the defendant had appeared, or the plaintiff filed common bail for him, was a nullity.

LORD KENYON Ch. J. The question is whether the perfecting of bail, which did not take place till after the plea was filed, shall make the plea a good one from the time of per-

(a) *Ante* 1 vol. 635. See also *Smith v. Painter*, *ante* 2 vol. 719,

fecting bail? We think not. As the plea was a nullity at the time when it was filed, it did not become a good plea by perfecting the bail afterwards. The case which has been cited goes a great way to determine the present.

Per Curiam,

Rule discharged.

1792.

VENN
against
CALVERT.

BAILLIE against CAZELET.

Monday,
Feb. 13th.

THIS was an action on a policy of insurance; the declaration contained several counts, averring interest in different persons. The defendant paid money into court upon some of those counts, which the plaintiff took out. And the master having only taxed the plaintiff his costs on those counts,

If a defendant pay money into court upon some of the counts only, and the plaintiff take it out, the latter is only entitled to the costs of those counts.

Law moved that the master might be directed to review his taxation, and to allow the plaintiff costs upon all the counts. He said that the other counts were not added for the purpose of vexation, but were essentially necessary, in order to adapt the declaration to the truth of the case as it might appear at the trial, it being doubtful who was interested. In *Hellier v. Hallett* (a) where money was paid into court upon some counts only, it was said, "If the plaintiff take the money out of court, he must have the costs of the whole to that time." And there does not seem to be greater reason why the defendant should in this stage of the proceedings be exempted from the payment of costs than after verdict, when, according to the general practice of the Court, the plaintiff is entitled to costs upon the whole declaration, though he only succeed upon one count. *Butcher v. Green*. Dougl. 677. 3d. edition.

Bower opposed this on the ground that it was not usual to allow the plaintiff all the costs under these circumstances; and that a contrary rule might be used as the means of oppression, for then a plaintiff would add unnecessary counts for the purpose of harrassing his debtor.

Lord KENYON, Ch. J. The invariable rule of this court is as it has been stated by the defendant's counsel; and it is founded on principles of justice. When a defendant pays money into Court on some of the counts only, it is saying in other terms, that he admits that the plaintiff has a cause of action against him to a certain extent, but that he means to defend himself against the charges contained in the other counts. And

(a) *Barnes*, 286.

1792.

BAILLIE
against
CAZELET.

the plaintiff, by taking the money out of Court, precludes himself from all right to the costs upon the other counts.

Per curiam.

Rule refused.

REGULA GENERALIS.

IT IS ORDERED by the Court, that from and after the first day of next *Easter* Term, on every appointment to be made by the Master, the party on whom the same shall be served and required to attend shall attend such appointment, without waiting for a second; or in default thereof the Master shall proceed *ex parte* on the first appointment.

END OF HILARY TERM.

C A S E S

1792.

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Thirty-second Year of the Reign of GEORGE III.

GARSDALE *against* The Proprietors of the TRENT
and MERSEY NAVIGATION.

Wednesday,
April 24th.

THE declaration in this case stated that the defendants were common carriers of goods &c, for hire, from *Stourport* to *Manchester*; and that the plaintiff on &c at *Stourport* delivered to the defendants four pockets of hops, to be by them taken care of and safely and securely carried from *Stourport* to *Manchester*, and to be forwarded from thence to *Stockport* for the plaintiff; that in consideration of the premises and also in consideration of certain hire and reward to be therefore paid to the defendants, they undertook to take care of the said hops and safely and securely to carry them and forward the same; yet that the defendants did not forward the said hops from *Manchester* to *Stockport*. The second count stated the delivery of the hops to the defendants, to be taken care of and safely and securely carried from *Stourport* and *Manchester*, and there kept by the defendants for the plaintiff until the same should be forwarded from *Manchester* to *Stockport*, &c. At the trial before *Wilson, J.* it appeared that the goods, directed to the plaintiff at *Stockport*, were delivered to the defendants to be carried by them from *Stourport* to *Manchester*; that they ar-

A common carrier between *A.* and *B.* employed to carry goods from *A.* to *B.* to be forwarded to *C.* carried them to *B.*, there put them in his warehouse, in which they were destroyed by an accidental fire before he had an opportunity of forwarding them; and held not answerable for the loss.

See vol. 1 p. 27.

1792.

GARSDIE
against
The Proprietors of
the TRENT
NAVIGATION.

rived safe at *Manchester* on the 30th of *September*, were that evening put into the defendant's warehouse there, where (together with other goods) they were consumed by an accidental fire that night, and before any carrier came from *Stockport*, to whom they could be delivered. It also appeared that, according to the course of business, when goods are sent from *Stourport* to go beyond *Manchester*, if any carrier to the place of their destination be at *Manchester* ready to receive them, they are immediately delivered upon payment of the carriage from *Stourport* to *Manchester*, and if not the defendants keep them in their warehouse till a carrier arrive to whom they may be delivered on making the above payment, the defendants not charging any thing for lodging and keeping the goods in their warehouse. Some time before the goods in question were delivered to the defendants, their agent told the plaintiff that if he would send all his goods by them they would forward them to *Stockport* by the first carrier that should come there, without insisting on being paid for the carriage before they delivered them, and would settle with him when they met. A verdict was taken for the defendants with liberty to the plaintiff to move to set it aside and to enter up a verdict for him, if this Court should be of opinion that the defendants were answerable under these circumstances.

Bower accordingly now moved to set aside the verdict; contending that the defendants were responsible, as it was a joint contract by them to carry the goods to *Manchester* and to keep them safe at that place till they could be forwarded to *Stockport*; and that it was for their convenience that the goods were deposited in their warehouse.

The Court refused even a rule to shew cause.

Lord KENYON, Ch. J. said, if the defendants were considered merely as warehousemen, there would be no pretence to say that they were liable for such an accident as the present. The case of a carrier stands by itself upon peculiar grounds; he is held responsible as an insurer; and the reason given in the books (whether well or ill founded is immaterial here) is, to prevent fraud. But I do not see how we can couple the character of the carrier with that of the warehouse-man, in which last the defendant are not liable here, they not having been guilty of laches.

BULLER, J. The keeping of the goods in the warehouse is not for the convenience of the carrier but of the owner of the goods;

IN THE THIRTY-SECOND YEAR OF GEORGE III.

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goods ; for when the voyage to *Manchester* is performed, it is the interest of the carrier to get rid of them directly ; and it was only because there was no person ready at *Manchester* to receive these goods that the defendants were obliged to keep them.

Rule refused.

1792.

GARSDALE
against
The Proprietors of
the TRENT
NAVIGATION.

FORTY against HERMER.

Wednesday,
April 25th.

ON a rule to set aside the *fiere facias* issued against one of the bail for this objection, among others, that the *alias scire facias* had not lain in the Sheriff's office the last four days before the return, it was said, by way of answer, that it had lain there four days before the return day, which was all that was required by the rules of the court, though it were not there the four last days ; it being returnable on the 6th of July, and having been taken out on the fourth. But

A *scire facias*
must lie in
the sheriff's
office the last
four days be-
fore the re-
turn.

Per Curiam. The rule is that the writ shall remain there the last four days ; and the reason is that the Sheriff may (if possible) serve it.

Rule absolute on this objection.

Holroyd in support of the rule.

Reader against it.

The KING against The Justices of LEEDS.

Wednesday,
April 25th.

BY the 20th section of the stat. 17 Geo. 3. c. 56. an appeal is given against the convictions founded upon that act ; " and the justices convicting are thereby required to make known to such person (convicted) at the time of such conviction his right to appeal to the next sessions &c ; such person at the time of such conviction giving to such justices notice in writing of his intention to appeal, and also entering into a recognizance, at the time of such notice, with sureties, conditioned to try the appeal &c ; and the justices at such sessions are thereby authorised and required upon due proof made of such notice of appeal, either by the acknowledgment of the justices to whom the same shall have been given, or otherwise, to hear and determine &c, and to award costs &c." Two justices, having convicted one *Coates* under this act of parliament, informed him of his right

By 17 G. 3.
c. 56. s. 20.
an appeal is
given to the
sessions a-
gainst cer-
tain convic-
tions, the
party giving
notice in
writing to the
justices con-
victing, and
entering in-
to a recogni-
zance to try
the appeal,
&c ; and
those justices
are required
to give notice
to the party
of his right

to appeal ; if those justices do inform him of such right, without saying any thing about the notice, and he enter into the recognizance, the sessions are bound to receive the appeal though he did not give the notice in writing.

1792.

The KING
against
The Justices
of LEEDS.

of appeal, upon which he entered into a recognizance before them, conditioned to try his appeal at the next sessions, as directed by the statute, but gave them no notice *in writing* of his intention to appeal; for want of which the magistrates at the sessions thought they had no jurisdiction, and refused to receive the appeal, though the justices convicting, who were in court, declared themselves satisfied with the notice as above. Upon these facts a rule was granted in the last term, calling on the defendants to shew cause why a *mandamus* should not issue, commanding them to receive and hear the appeal; which was now opposed by

J. Heywood on the ground that the statute had made the giving of notice *in writing* an indispensable condition previous to the appeal, without complying with which the party had no right to appeal, nor the sessions any jurisdiction to receive it; and that the entering into the recognizance could not answer the purpose of notice, because the Legislature had directed the one as well as the other; "give notice in writing, and also enter into a recognizance &c." He also cited *R. v. The Justices of the West Riding of Yorkshire* (a) to shew that this court have always been strict in requiring a compliance with the conditions upon which an appeal is given: there the appellant having neglected to enter into a recognizance within four days after notice, as the act required, the Sessions refused to receive the appeal; and this Court afterwards held that he was not entitled to appeal at the next sessions, on complying with the requisites of the act, though those sessions were within the time given to appeal.

Wood, in support of the rule, insisted, first, that the appellant had substantially complied with the requisites of the statute, for that sufficient notice had been given to the justices convicting by entering into the recognizance before them, conditioned to try the appeal, which could not be necessary for any other purpose; and that those very justices had in open court declared themselves satisfied with that notice. But, 2dly, if a notice in writing also were indispensably necessary, that the justices convicting should have informed the appellant of the necessity of giving such notice, and that for their neglect of duty he ought not to suffer.

Lord KENYON, Ch. J. When the Legislature directed the convicting magistrates to make known to the party convicted his right to appeal, they must be understood to mean that the

(a) *Ante* 3 vol. 776.

justices should inform him of the necessary steps to be taken by him to enforce that right. These two magistrates therefore should have informed the person convicted not only that he might appeal against their decision, but also of the necessity of giving them a notice in writing as well as of entering into the recognizance; otherwise the party convicted would be deluded by the act of the justices in taking the recognizance. This case is distinguishable from that cited, because here the party is supposed by the Legislature not to know the directions of the act, by their requiring the justices convicting to give him that information.

Per Curiam,

Rule absolute.

PRAED Administrator of BLACKWELL *against*
The Dutches of CUMBERLAND, Executrix of
the Duke of CUMBERLAND.

1792.

The KING
against
The Justices
of LEEDS.

Friday,
April 27th.

DEBT on bond. The defendant, after craving oyer of the bond, which was a joint and several bond from the Duke of Cumberland and *T. S. Lutterell*, and of the condition, (which, after reciting that *Blackwell* had contracted with the Duke of Cumberland and *T. S. Lutterell* for the purchase of an annuity of 800 *l.* to him, *Blackwell*, during the life of *T. S. Lutterell*, for the price of 4800 *l.* which had been accordingly paid by *Blackwell* to the Duke of Cumberland and *T. S. Lutterell*, &c, was for the payment of the annuity) pleaded, That no *such* memorial of the bond as is required to be enrolled in Chancery by a certain act 17 *Geo.* 3. entitled &c. was enrolled, &c, before the commencement of the plaintiff's suit, &c. Replication that before the commencement of the plaintiff's suit, to wit, on &c, a memorial of the bond was enrolled &c, and that such memorial contained the day of the month and the year when the bond bore date, and the names of all the parties and witnesses, and set forth the annual sum to be paid, and the name of the person for whose life the annuity was granted, and the consideration of granting the same, according to the form of the statute &c; as by the inrollment of the said memorial remaining of record in the said court of Chancery at *Westminster* aforesaid more fully appears; and this he the said plaintiff was ready to

If to debt on an annuity bond defendant plead no such memorial as the statute requires, to which plaintiff reply that there was a memorial which contained the names of the parties, &c, and the consideration for which the annuity was granted, and the defendant rejoin that the consideration is untruly alleged by the memorial to have been paid to both obligors, for that one of them did not receive any part of it; this rejoinder is bad; 1st. Because it is a departure from the plea; 2dly. Because the fact alleged respecting the memorial does not contradict the replication: for the consideration might have been paid to the other obligor on account of himself and the co-obligor, or to a stranger for them both.

der is bad; 1st. Because it is a departure from the plea; 2dly. Because the fact alleged respecting the memorial does not contradict the replication: for the consideration might have been paid to the other obligor on account of himself and the co-obligor, or to a stranger for them both.

1792.

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 PRAED
 against
 The Dutches
 of CUM-
 BERLAND.

verify by the said record &c. Rejoinder, True it is that the memorial of the bond in the replication, &c, mentioned was enrolled on the day and year &c. mentioned; but it alleged that the memorial did not truly set forth the consideration on which the annuity was granted, but on the contrary set forth a false consideration for granting the same, in this, that the memorial set forth that the annuity was granted in consideration of 4800*l.* paid to the said *T. S. Lutterell* and the said Duke of Cumberland, when in truth and in fact *Blackwell* did not at the time of the supposed execution of the bond, or at any time before or afterwards, pay to the said Duke in his life-time the said 4800*l.* in the bond and memorial mentioned, or any part thereof, nor did the said Duke at the time of the supposed execution of the bond, or at any time before or afterwards ever, receive or take the said sum &c. specified to be the consideration for the supposed bond, or any part thereof, &c, or any other consideration whatever; and this &c. To this there was a demurrer; setting forth for causes, that the defendant had by her plea in bar alleged that no memorial of the writing obligatory in the declaration mentioned had been enrolled, and yet in the rejoinder the defendant admitted that there is a memorial enrolled, and alleged that the facts contained in it are untruly set forth, which is a departure from the plea in bar; that the rejoinder introduced matter to be tried by the country after the plaintiff had replied with a verification to be tried by the record; that the rejoinder alleged matter immaterial, and not traversable, and denied the existence of a fact not alleged in the memorial set forth in the replication; that the rejoinder was no answer to the replication &c. Joinder in demurrer.

Shepherd, in support of the demurrer, contended that the rejoinder was bad on two grounds; 1st, That it was a departure from the plea; 2dly, That it alleged no matter inconsistent with the allegations in the memorial. 1st, It is a departure, because the plea denies the existence of any memorial, whereas the rejoinder admits its existence, but attempts to invalidate the force of it, because it does not set forth the true consideration of it. This is like *Morgan v. Man* (a), where to debt on bond the defendant, after craving oyer of the condition, which was for performance of an award, pleaded no award made; the plaintiff replied and shewed an award; the defendant rejoined that other matters were referred, of which the arbitrators had taken no

(a) *Sir Thomas Raym.* 94. 1 *Sid.* 180.

notice, and therefore this was no award; to which the plaintiff demurred, and had judgment, on the ground that this was a departure; for the defendant ought to have pleaded this special matter in his plea at first. To the same effect is *Roberts v. Mariett* (a). So in *Elliot v. Lane* (b) the defendant pleaded to a *scire facias* upon a recognizance of bail that no *ca. fa.* was taken out against the principal defendant: the plaintiff replied there was one issued, and returned *non est inventus*; the defendant rejoined that the *ca. fa.* did not lie four days in the sheriff's office; and this was held on demurrer to be a departure. Secondly, The rejoinder states no matter which is contradictory to the memorial stated in the replication. The allegation in the memorial is that the money was paid to *T. S. Lutterell* and the Duke of Cumberland; this is not denied by averring that the payment was to the former; for he might have received one moiety for himself, and the other for the Duke: and in the case of a joint transaction like this, payment to one would in point of law be a payment to both.

Baldwin, contra, in answer to the first objection admitted the authorities cited, but denied their application to the present case; for so far from the rejoinder being inconsistent with, and a departure from, the plea, it strengthens and affirms it. The plea does not deny the existence of *any* memorial, but only *such* an one as is required by the statute; and the rejoinder shews the reason why there is not *such* a memorial, by stating that the memorial which was enrolled did not contain the real consideration, which is expressly directed by the statute. The plea therefore was correct in stating in general terms that there was no *such* memorial as the act directs; and the rejoinder in pointing out in what particular the memorial was not such as is required was equally consistent with the truth of the case and the plea in bar. As to the second objection, the allegation in the rejoinder does in substance contradict the memorial. By denying that the Duke of Cumberland ever received the supposed consideration, or any part thereof, or any other consideration for granting the annuity, it substantially denies that *T. S. Lutterell* ever received it for him. And notwithstanding it is stated in the condition of the bond that the consideration was paid to both of them, it is competent to the defendant to shew that in point of fact all the consideration was received by one only, as was

1792.

PRÆD
against
The Dutches
of CUM-
BERLAND.

(a) 2 Saund. 188.

(b) 1 Wilf. 334. *Powell v. Taylor, M.*

28 Geo. 3. B. R. S. P.

1792.

PRAED
against
The Dutchess
of CUM-
BERLAND.

done in *Stratton v. Raftall* (c); where both the principal and the surety had given a joint receipt for the consideration money. Now if in fact *T. S. Lutterell* received the whole consideration money, it should have been so stated in the memorial; and for that defect the whole may be avoided.

LORD KENYON, Ch. J. Both points are clearly against the defendant. With regard to the second, the defendant in her rejoinder averred a fact supposed to be contradictory to the memorial, which is not so. It appears by the memorial that the consideration money was paid to the Duke of *Cumberland* and Mr. *Lutterell*; which, the defendant has attempted to say, is not true; but the reason, she has given why it is not true, does not support the proposition; because, though the money were not paid into the hands of the Duke of *Cumberland*, it might have been paid to some third person under a joint authority from the Duke of *Cumberland* and Mr. *Lutterell*, or to Mr. *Lutterell* for himself and the Duke. This memorial therefore is conformable to the directions of the annuity act for any thing that appears to the contrary upon the record.

ASHHURST, J. The rejoinder is clearly a departure from the plea in bar. A memorial was inrolled, which upon the face of it was a good one; and if the defendant wished to impeach it, she should have pleaded it, and shewn in what particular it was defective, and thus have compelled the plaintiff to take issue upon that fact. But, having in her plea in bar alleged that there was no memorial, she ought not afterwards to be permitted to admit in her rejoinder that there was one, and then deny the validity of it.

BULLER, J. Nothing is clearer than that this is a departure: the defendant's argument goes to admit it. The whole question turns on the word "such". Now what is the meaning of the plea in this case; or of the plea of no award, or that of no *capias ad satisfaciendum*; they tender issues in fact, and not in law. We are not to require under the allegation "of no such memorial" every thing that is required by the act of parliament: it is merely an issue in fact. So in the case of an award; if there be an award in fact, the party cannot on the trial of an issue of no award go into objections to the award in point of law. It has however been said that the plaintiff might have replied that there was *no such memorial, &c.*, in order to have let in the objections which arise under the act of parliament: but

that word cannot make any difference; it is still but an issue in fact; for otherwise it would be sending down an issue in law to be tried by a jury: and it might be as well contended that, on the trial of an issue "*nul tiel record*", the parties might at *nisi prius* shew errors on the record. The other ground also fails the defendant, for the reasons already given by the Court.

GROSE, J. of the same opinion.

Judgment for the plaintiff.

1792.

PRAED
against
The Dutcheſs
of CUM-
BERLAND.

HALL *against* LAWRENCE.

Saturday,
April 28th.

THE parties having referred all matters in difference to the award of two arbitrators, or, in case of their disagreeing, of an umpire, the arbitrators regularly heard all the evidence, but, disagreeing, stated this evidence to the umpire, on which he made his award without re-examining the witnesses. After he had made the award, the party against whom it was made applied to him to hear the evidence himself, and, on his refusing, moved this Court to set aside the award: But

The Court thought that, as no application was made to the umpire to examine the witnesses before he had made his award, the

Rule should be discharged with costs.

Gibbs in support of the rule. Bower, *contra*.

The Court will not set aside the award of an umpire because he received the evidence from the arbitrators without examining the witnesses, unless he were required to re-examine them before the making of his award.

GREEN *against* The NEW RIVER COMPANY.

Saturday,
April 28th.

THIS was an action for consequential damage to the plaintiff's horse by reason of the bursting of a pipe belonging to the *New River* works, owing to the negligence of the defendants. A witness was called at the trial before Lord *Kenyon* at *Westminster* to prove the negligence, which his lordship held to be necessary to support the action; and that witness swore that he had some hours before the bursting of the pipe, and the consequent accident, informed the turncock, one of the defendants' servants, of the ouzing of the water, which intelligence (if it had been attended to in time) would have enabled him to provide against the mischief. In answer to this the defendants' counsel offered to call the turncock himself, to disprove the evidence of the other witness; which the plaintiff objected

In an action against a master for the negligence of a servant, the latter is not a competent witness to disprove the negligence, without a release.

1792.

GREEN
against
The NEW
RIVER COM-
PANY.

to without a release; and none such being prepared, his ordship was of opinion that the turncock was an incompetent witness, as he came to disprove his own negligence, which if established by the verdict would be the ground of an action against himself by his employers. And the jury having found for the plaintiff,

Erskine moved to set aside the verdict for the rejection of the witness, contending first that he was not interested in the event of the suit, inasmuch as the verdict could not be given in evidence in any action which the defendants might bring against him. And even admitting him to be interested, yet he was a witness from necessity, on the same ground that coachmen and sailors are admitted to give evidence to disprove their own negligence in actions against their masters and employers for damage done in their several occupations, or that on which a servant of a tradesman is permitted to prove the delivery of goods. But

Per Curiam. The last instance cited is an exception to the general rule; such a person is admitted to give evidence, merely from necessity. But the exception does not extend to the two other cases mentioned of the coachman and the sailor: the verdicts against the proprietors of those may be respectively given in evidence in actions to be brought by them against their servants, as to the quantum of damages, though not as to the fact of the injury. So the verdict in this case may be given in evidence in an action by the defendants against the witness; and therefore he is an incompetent witness without a release.

Rule refused.

Saturday,
April 28th.

POPE *against* FOSTER.

An averment in a declaration of the day of a former trial must exactly agree with the record to be produced in evidence to support it, though it be laid under a *vide licet*.

THIS was an action for a malicious prosecution tried at the Sittings after last term before Lord *Kenyon*. The declaration after setting forth the record of the indictment, and the removal of it into the King's Bench by *certiorari*, proceeded thus; "and the plaintiff further says that the said indictment "being so brought &c, he did in due manner traverse the said "indictment; and such proceedings were thereupon had in the "said court, &c, that the said traverse afterwards, *to wit, on the* "25th February 1791, at &c, duly came on to be tried &c;" and so proceeded to state the acquittal &c. The copy of the record of the indictment produced in evidence stated the award of the

the jury process thus; "If the Ch. Justice shall come before that time (that is to say) on Tuesday next after the end of the [Easter] term, &c, at Guildhall, &c, according to the form of the statute &c to try &c; at which time, to wit, in 15 days from the feast of Easter aforesaid, the Chief Justice before whom the said jury came to try in form aforesaid sent here his record had before him in these words, that is to say; afterwards, on the day and at the place last within mentioned before &c, the defendant was acquitted &c." Upon the production of this record *Garrow* for the defendant objected, that the plaintiff could not prove the allegation of his acquittal but by record, and that this record proved it on a day different from that alleged in the declaration, and therefore the variance was fatal. To this it was answered by *Erskine* that the day in the declaration mentioned being laid under a videlicet was immaterial, and that he might shew the true day by other evidence, which he offered to produce. But Lord *Kenyon* was of opinion that he could not receive any other evidence to contradict the record; and as by that the trial and acquittal appeared to be on a different day from the one declared upon, he thought the variance was fatal, and non-suited the plaintiff.

Erskine now moved to set aside the non-suit upon the same ground; which was refused by

The Court; who said that a party in stating the proceedings at *nisi prius* might allege that the trial was had on the first day of the Sittings, although in fact it was had on a subsequent day of the same Sittings, the whole Sittings being in law but one day, provided the record when produced would support such an averment. But that here the day mentioned in the declaration varied from the day in the record produced, and that not as being a different day merely of the same Sittings but of a different Sittings. And that this objection was equally fatal, though it were laid under a videlicet, the day being material.

Rule refused.

The KING against The Inhabitants of ESSEX.

Wednesday,
May 2d.

A Fine having been imposed by Lord *Loughborough*, when going the Home Circuit in the year 1789, upon the county of *Essex* for neglecting to repair the county gaol, and that

think illegal, they may order the treasurer to defray the expence of litigating the question out of the county stock. *See Falk. 605. 1. Barnard. 165. 191. Caldecott's Cases 309.*

If a fine be imposed on a county, which the justices at the sessions

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fine having been estreated in the Exchequer, the legality of it was there litigated by the direction of the county magistrates, who in order to defray the expences of such litigation made the following order at the quarter-sessions; It "is ordered by this Court that the further sum of 150*l.* be "advanced by the treasurer of this county to *W. Bullock*, esq. "clerk of the peace for the said county, on account of the ex- "pences of defending the inhabitants of the said county from the "fine (a) imposed on them by Lord *Loughborough*, subject to "the discussion of any right that the county have to dispute the "payment of such money." This order having been removed by *certiorari* into this court, and a rule having been obtained to shew cause why it should not be quashed,

Bearcroft and *Wood* now shewed cause; relying on the 12 *Geo. 2. c. 29.* which after stating the difficulty of raising separately the several county rates applicable to particular services appointed by different acts of parliament therein enumerated, and amongst others one of *Will. 3.* for building and repairing county gaols, empowers the justices of the quarter sessions to make one general rate or assessment; and by the 6th section directs the sums to be paid into the hands of the county treasurers, who are thereby commanded to pay it to such persons, "as the said justices, at their respective general or quarter-sessions, or the greater part of them &c, shall by their orders from "time to time direct and appoint, *for the uses and purposes of the "said recited acts, and for any other uses and purposes to which the pub- "lic stock of any county &c, is or shall be applicable by law.*" The latter part of the clause, they contended, shewed that the Legislature had other purposes in contemplation, to which the county stock might be applied, besides those particularly enumerated in the recited acts: and that this was one of those was plainly to be inferred as well from the reason of the thing, and long usage in similar cases, as from the fair inference of a subsequent statute, the 14 *Geo. 3. c. 59.* As a fine when levied must be paid out of the county stock, and as cases may arise in which it may be illegally levied, the expence of litigating the legality of the fine ought to be borne by that stock which is to be protected by it; otherwise the county must in all instances be obliged to submit to the imposition of a fine, however illegal.

(a) Although the order does not state on what account that fine had been imposed, yet it was agreed that the question should be

argued and determined as if it were expressed in the order that the fine was imposed on the account abovementioned.

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And as the magistrates of the county have the disposition of the public purse, they are the most proper judges of the necessity or propriety of incurring such expence in defence of the general interest. Again, magistrates have at all times exercised this kind of discretion over other objects than those particularly provided for by statute. They have often directed prosecutions for misdemeanors at the public expence, although (strictly speaking) they are not authorized to make allowance for any other public prosecutions than felonies. Lastly, by the 14 Geo. 3. c. 59. the management of county gaols is submitted to the magistrates in quarter sessions, who may issue such orders as they think necessary for the purposes of the act; and it is thereby directed that the expences attending the execution of such orders shall be defrayed out of the county rates. In this instance they act as trustees for the county; and the expences of litigating a question in which the county are directly interested ought to be borne, not by the individual magistrates, but, by the county at large.

Erskine and Bower, contra, said that to support this order it was not enough to shew that by the words of the 12 Geo. 2. the magistrates might appropriate the county stock to other purposes than those which were before specifically enumerated, and "to such other as by law it is applicable," for the question still remains whether this be such a purpose as is there referred to: no authority has been cited to shew that it is; and not a single instance has been mentioned of any attempt similar to the present. Nor can it be contended that the words alluded to will otherwise have no operation; for the expences of prosecution for felonies are not before referred to in the act, which is sufficient to satisfy those words. The magistrates have no discretionary power over the county purse; they can only apply the public money to such purposes as are specifically provided for, or which are sanctioned by long and undisputed usage. Unless this rule be strictly adhered to, no other line can be drawn, and the departure from it may lead to the most dangerous abuses.

Lord KENYON, Ch. J. If the contest in this case had been whether the justices of the county could arbitrarily impose taxes on the county, the only answer, that could have been given, would have been in the negative. But the question here is where by any express law, or by precedent and long usage, that which has been done was not lawfully done: and if it be warranted by precedent and long usage, and

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by many analogous cases in the law, the order may be supported, though there be no precise act of parliament to direct it. Long before the statute alluded to, various duties were imposed upon counties, one of which was the repair of bridges, and that was before any county rate was directed to be made by any act of parliament. And whether these duties arose by the common law or were imposed by any statute, it was at the same time implied that those, who imputed any neglect to a county, might do so without any foundation; in which case the county must necessarily have had the power of defending themselves. Trials of this kind have been frequently had, and even disputes between two counties, which could not have been conducted without great expence; that expence has always been borne by the county, and taken out of the county stock; and yet there is no act of parliament to enable the county to do so, but it is founded on long usage and the necessity of the thing. I am not driven, nor will I ever resort to, the maxim, *communis error facit jus*; but uniform and unbroken usage *facit jus*. This is that which makes the common law: it is not to be found in the statute-book, but in the text-books, which treat on it as the common law of the land. There is another class of cases analogous to the present, the costs of defending appeals against orders of removals. The stat. 43 *Eliz. c. 2. s. 1.* gave power to the parish officers to raise a parish stock; and when a subsequent statute, 13 & 14 *Car. 2.*, raised the questions of settlements, it became necessary to have recourse to some fund for defraying the expences of litigating them; and those expences have always been paid by the parish officers out of the parish stock. The proposition therefore on which I rely is this; that wherever a duty is imposed on a county, and where costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates, who have the superintendence over the county purse, have necessarily a right to defray such expences out of the county stock.

ASHHURST, J. Where magistrates have acted *bonâ fide* for the interest of the county, over which they preside, in opposing the levying of a fine, which (as they think) has been improperly imposed, they ought not in reason to be burthened individually with the expences attending it. And if any authority can be found, either of the same kind, or by analogy to similar cases, it ought to be adopted in this case. Now the instance (mentioned by my Lord) of defending appeals seems strong in point. The sta-

ute of *Elizabeth* directs the overseers to provide a stock for the relief of the poor of the parish, the putting out of parish apprentices, "and to do and execute all other things as well for the disposing of the said stock, as otherwise concerning the premises, as to them shall seem convenient." It might therefore be argued that the stock should not be applied to any other purposes than those specifically mentioned: but a subsequent statute having directed the removal of paupers, and the expences of litigating the questions of settlement being a consequence upon such removal, it has been the constant practice to allow these expences to be defrayed out of the parish stock; the legality of which has never been disputed. So, in this case, the act of parliament having directed a county stock to be raised, and to be applied to certain purposes therein mentioned, and to others "to which the public stock of any county is applicable by law," reason and analogous cases warrant us in saying that the expences of litigating the legality of the fine imposed upon the county ought to be defrayed out of the county stock.

BULLER, J. Whether this case be considered on the principles of the common law, on the authority of analogous cases, or on the words of the statute itself, I am of opinion that the order of sessions may be supported. The case of bridges bears so strong an analogy to the present, that on principle it is not to be distinguished from it; and that, it is to be remembered, was a case well established before the statute 12 *Geo.* 2. Then, if at that time all the expences incurred in litigating questions between two counties should be borne by the respective counties, and paid out of their county stocks, let us see how the question stands since that act. That statute, after reciting two former acts respecting the repair of county bridges and highways, and other statutes respecting gaols and other different objects, for each of which a separate rate was to be raised, directs one general rate to be made for the purposes of those acts and for other purposes to which by law it is applicable. Now if before that act the county were liable to pay the expences of litigating questions respecting the repairs of bridges and highways, it must still continue liable, notwithstanding the words of the act are confined merely to *repairs*: and if this be the true construction of the statute with regard to bridges and highways, we cannot put a narrower construction on it as to county gaols. In my opinion the true construction of this act is that the necessary expences of every thing relating to the subjects therein mentioned must

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must be borne by the county, and paid out of the county stock. If it were otherwise, the active magistrates of a county would be put in a perilous situation, in a variety of cases that might happen. For instance; the justices of the peace have under one of the acts (a) power to purchase land adjoining to county bridges: now if the words of the statute be taken strictly, they would be confined to the sum contracted for with the seller; but the purchase cannot be completed without some other contingent expences, taking an abstract of the title, drawing the conveyance, &c, which must therefore necessarily be included in the act. To go a step further; objections may be made to the title after the contract is entered into, and a suit may be instituted against the magistrates, who contracted, to compel them to carry the agreement into execution; it would be absurd to say that those who have contracted on behalf of the county should not be defended at the expence of the county against such a suit. It seems therefore that the necessary expences attending all those subjects mentioned in the act must be paid out of the county stock; and that is sufficient for the determination of this case. But, even upon more general grounds, when a county is attacked, they should have the power of defending themselves, if unjustly attacked; and whether or not there be just grounds on which they may defend themselves, it must, according to reason, the words of the statute, and by necessary implication, be determined by the justices acting at the sessions, in whose hands the distribution of the county rate is vested.

GROSE, J. declared himself of the same opinion.

Order of Sessions affirmed.

(a) 14 Geo. 2. c. 33. s. 1.

Wednesday,
Feb. 8th.

The KING against The Inhabitants of STOTFOLD.

An order of removal signed by two justices separately, and in different counties, is only voidable, not void; and the parish wishing to avoid it must appeal to the next sessions.

ON an appeal against an order, by which *M. Shaw*, his wife and eight children, were removed from *Stotfold* to *Chilvers*, the order was quashed, subject to the opinion of this Court on the following case.

M. Shaw, the pauper, was born at *Stotfold* in 1741; his father, who died about twenty years since, was then and continued to the time of his death a settled inhabitant of *Chilvers Coton*; and the pauper *M. Shaw* has acquired no settlement in his own right, except in the manner following. The pauper was removed in the

the year 1776, with his wife and five children, none of whom, nor any of the other children named in the present order, have gained any settlement in their own right, from *Sandon* in the county of *Hertford* under an order of removal, in the usual form, to *Stotfold*. The parish officers of *Sandon* took this order, and the paupers, immediately to *Stotfold*, and there delivered them with the order to the parish officers of *Stotfold*, by whom they were received; and against that order there was no appeal. The pauper with his family has ever since till the present removal occasionally resided in, and been relieved by, the parish of *Stotfold*. It was then proved on the part of the respondents (after hearing counsel for the appellants who objected to the evidence as inadmissible, but which objection was over-ruled by the Court) that the order of removal from *Sandon* to *Stotfold*, and the examination on which that order was founded, were in fact signed and taken by the two justices separately, and not in the presence of each other; and that one of the two justices, though a magistrate for the county of *Hertford*, took the examination and signed the order at his own house situate in that part of the town of *Roydon* which lies in the county of *Cambridge*; *Roydon* being partly in the county of *Cambridge* and partly in that of *Hertford*.

Bearcroft and *Chambre*, in support of the rule to quash the order of sessions, admitted that an order of removal unappealed against is conclusive, if made by two justices acting within their jurisdiction, but contended that the order in 1776 was an absolute nullity, being made by one justice only who had jurisdiction. The magistrate, who examined the pauper and signed the order in *Cambridgeshire*, acted out of his jurisdiction. But a justice of the peace for one county cannot act in another; his acts there have no greater force than those of a person who is not a justice; for there he is not a magistrate. 15 *Vin. Abr.* 11 D. 2. Then if this order were a nullity when it was made, it never can become a valid instrument, but may be resisted whenever it is attempted to be enforced, though there were no appeal against it. Trespas may be brought for distraining for a poor rate, if the party be not an occupier, though the rate be good on the face of it, and it be necessary to impeach it by extrinsic evidence; or he may replevy the goods distrained. *Milward v. Caffin*, 2 *Bl. Rep.* 1330; and in that case the Court said that the confirmation by the sessions on appeal was also a nullity. This shews that it was

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not only not necessary to have appealed in this case, but that, had there been an appeal, the order was not capable of confirmation. In *R. v. Flisber* and another (a), where the defendants appealed against an order appointing them overseers, on the ground that the persons appointing them were not justices, Lord Mansfield said "There can be no appeal to the quarter-sessions from the acts of persons calling themselves justices, and who are not so. If persons exercise a jurisdiction, who are not entitled, the whole is a nullity, and the party aimed at need not pay any regard to it." Again in *R. v. Swalcliffe* (b) an order of removal to *Ascot*, a large village in *Whitchford* parish, against which there was no appeal, was afterwards held to be a nullity; and Lord Mansfield said "As to the removal to *Ascot*, it was no reason for an appeal. It was in truth no removal at all: it was a mere nullity." There the defect was not apparent on the order itself, but was explained by extrinsic evidence. That case proves not only that an order, though good on the face of it, may be impeached by parol evidence which shews it to have been originally void, but also that the parish receiving the pauper under such an order is not estopped to give that evidence. If arguments of convenience be urged on the other side, it may be observed that they have no reason to complain of any inconvenience, since the parish of *Stotfold* have for many years been maintaining the pauper and his family, whom they were not bound to support at all.

Wilson, Garrow, and Willis, contra. It is an universal principle, from which it will be dangerous to depart, that an order of removal unappealed against is conclusive as to all the world. And the object of the Legislature, in giving an appeal against orders of removal, was to bring all these questions to a final determination soon after they arose. In this case the pauper was not only received by *Stotfold* parish under the former order, but occasionally relieved there for 15 years. It is to be observed also that there is no objection to the order on the face of it: The justices at the sessions had jurisdiction over it; and it ought not to be impeached in this indirect manner after the time for appealing against it is expired. It has been contended however that it was a mere nullity, and that *Stotfold* could not have appealed against it: in answer to which it must be remarked that

(a) *Cald.* 137.(b) *Ib.* 248.

almost all the questions respecting the illegality of orders of removal have arisen on appeals; and many of them too in cases where the defect was apparent on the order; *R. v. Hareby* (a), not said to be made "on complaint;" *R. v. Weston Rivers* (b), not on the complaint "of the churchwardens;" *R. v. Walton* (c), not said to be made by "two justices;" *R. v. Uplin* (d), only justices of the county, not "justices of the peace;" and *R. v. Dobbyn* (e), only justices *in*, not *of* or *for*, the county; and a variety of similar cases might, if necessary, be produced. These shew the universal opinion of *Westminster-Hall* upon this point; for if they were not the subject of an appeal, not only the respective courts of quarter sessions have exceeded their jurisdiction in entertaining the appeals, but this court has also acted improperly in granting writs of *certiorari* to remove the proceedings in such cases; for if the original orders were nullities, and need not have been appealed against, it was nugatory to have them returned into this court for the purpose of quashing them, since whether quashed or not they could never be enforced. It seems then too much to suppose that the uniform practice in all the courts of sessions from the reign of *Charles* the Second to the present time, sanctioned even by the authority of this court, has been ill-founded in law: but that practice is warranted by the construction of that clause in the act which gives an appeal (f) to the next sessions, and it has convenience and justice for its support. It is highly convenient to the public that these questions should be litigated soon after they arise; and it is more just that the parties, who intend to object to an order of removal on some other ground than the real merits of the case, should be compelled to make that objection early than be permitted to wait till all evidence is lost, on which another order, grounded on the merits, may be made. There is also another reason why the evidence offered should not have been admitted, because the parties to be affected by it could not be prepared to repel it. As to *R. v. Swalcliffe*; the village, to which the order of removal was directed, was not a parish, and did not maintain its own poor; there was therefore no one to appeal. But in *R. v. Kirkby Stephen* (g), it was held that an order, though made to the parish, instead of the township which maintained its own poor, was conclusive on the latter, though

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(a) *Andr.* 361.(b) *Salk.* 492.(c) 5 *Mod.* 322.(d) *Cas. of S.* 27.(e) *Salk.* 474.(f) 13 & 14 *Car.* 2. c. 12. s. 2.(g) *Bott.* 209.

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there were no appeal. The case of *Milward v. Caffin* (a) cannot indeed be reconciled with the other cases: but it is to be observed that *De Grey*, Ch. J. was absent when it was decided; and in a subsequent case at *nisi prius* Buller, J. ruled differently; *Kettle and Another v. Walton* (b). That was trespass for taking a distress for a poor rate; the question was whether the two plaintiffs were joint occupiers; and Buller, J. said, that it was a proper question to be tried at the sessions, and could not be gone into in that action. Now if only one occupied, the other was not an occupier at all. In *R. v. Saltrem* (c), on an appeal against a parish indenture of apprenticeship, one objection here was that the Sessions had refused to receive evidence to shew that at the time of signing the indenture the name of only one justice was put to it; to this it was answered that the appellant should have appealed before he signed the counterpart, and that his having executed it should operate as an estoppel to his afterwards impeaching it; and of this opinion were the Court. So in this case the parish of *Stotfold*, by receiving the pauper under the order, are estopped to impeach it now: if they had intended to dispute its validity, they should have appealed against it to the next sessions.

The Court took time to consider of this case; and now the counsel moving for the opinion of the Court,

Lord KENYON, Ch. J. said that he was not then prepared to state from his papers the reasons at length upon which their judgment was founded, but that he had thoroughly and attentively considered the question, and that the result of his deliberations and of the rest of the Court was that the former order was only *voidable*, not absolutely *void*; and therefore that it was necessary for the parish, who wished to avoid it, to have appealed against it in the regular course of proceedings. That it would be extremely inconvenient to permit a parish to set aside an order of removal at any distance of time, which had been acquiesced under for years without any dispute. And that a distinction had always prevailed between void and voidable instruments; a strong instance of which was that on the construction of the stat. *Westminster* 2. c. 1.; which, though it enacts that all fines contrary to that act shall be *ipso jure* null, has been held to mean only *voidable* by some legal proceeding.

(a) 2 Bl. Rep. 1330.

(b) *Huntingdon Spring Assizes*, 1780.

(c) *East*. 24 Geo. 3. B. R.

GROSE, J. also added, that in a case in *Strange* (a) it was held that the sessions "have power to look into the jurisdiction of the justices" removing.

Per Curiam. Order of sessions, quashing the original order, confirmed.

(a) *Albrighton and Shipton*, 1 Str. 300.

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DOE on the several Demises of TURNER and Wife,
and WARD, against KETT.

Friday,
May 4th.

THIS was a special case reserved at the trial of an ejectment, brought to recover an estate in *Suffolk*. *N. Goddard*, by will dated 17th November 1758, devised to her grand-daughter *Elizabeth Foldsom* and the heirs of her body lawfully to be begotten, and for default of such issue to *E.* the wife of *J. Ward* for life, and after her decease to the three eldest children of *E. Ward*, or such of them as should be living at the time of her decease, and to their heirs, as tenants in common, with this proviso; "if any of the said devisees, to whom an estate tail in the said respective premises is hereinbefore limited, shall at any time levy a fine, or suffer a common recovery, of the same, in order to enable him, her, or them, to sell, mortgage, or otherwise dispose thereof, or to bar the said intail, then I do order, direct, and give full power and authority to the person or persons who shall be next entitled to enter &c." After the making of the will *E. Foldsom* married *J. Kett*, and in December 1760, in the life-time of the devisor, died, leaving a son, the present defendant. The devisor knew of the birth of the defendant, and of the death of his mother, immediately after those events happened. In October 1762 the devisor made a codicil to his will, attested by three witnesses, in which he recited that in his will he had appointed one *S. G.* one of his executors, which he wished to revoke, and then he appointed *N. G.* in his stead; and after giving the new executor a small legacy, he concluded thus; "And I do hereby declare that my said will in writing, bearing date, &c, and this codicil, which I will shall be added to and deemed part thereof, do contain my last will and testament." In October 1763 the devisor died; since which time the defendant has been in possession. *E. Ward* died in August 1782, in the life-time of her husband *J. Ward*, leaving two children, *M.* the wife of *J. Turner*, one of the lessors of the plaintiff, and

A. devised to *B.* and the heirs of her body, and for default of such issue, then over; *B.* died in the life-time of *A.*, and then *A.* by a codicil confirmed his will; held that the heir of *B.* took nothing, though it appeared that *A.* knew of the death of *B.* and of the birth of her son, before he made the codicil.

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T. Ward; who were two of the three eldest children of *E. Ward* at the time of making the will, and at the time of the devisor's death; the other children of *E. Ward* having died before her. *T. Ward* died in October 1783, leaving *T. M. Ward*, the other lessor of the plaintiff, his eldest son and heir at law.

Wilson, for the plaintiff, contended that the devise to *E. Foldsom* and the heirs of her body became void by the death of *Elizabeth* in the devisor's life-time; and that nothing passed by the codicil to her children. With regard to the will itself; it was finally settled in *Hodgson v. Ambrose* (a), and *Warner v. White* (b), (where a contrary dictum of *Popham, J.* in *Fuller v. Fuller*, Cro. Jac. 423. was over-ruled) that such a devise is void in the event that has happened; that the words "heirs of the body" are merely a description of the interest given to the ancestor; and that "in default of such issue" mean only the determination of the estate tail. Neither does the codicil vary this case in favor of the defendant. On the face of it there is nothing particularly applicable to this devise. The general object of it was to change an executor. It is true that it appears by the case that the devisor, when he made the codicil, knew of the death of *E. Foldsom*: but that operates in favor of the plaintiff; because, if the devisor had intended to give any estate to *E. Foldsom's* children, he would have made such a devise in express terms. It was said in *Hodgson v. Ambrose* that where a devisor uses technical words, they must be understood in their legal sense, unless other words be also used to shew that he used them in a different one. But here are no other words to shew that the devisor used the words "heirs of the body" in a different sense from that which the law gives to them. Now the only effect of the codicil is that it operates as a re-publication of the will: then reading this will as if made at the time of the codicil, it is a devise to *E. Foldsom* and the heirs of her body; and there being no such person in *rerum naturâ* as *E. Foldsom*, the devise is absolutely void. *Brett v. Rigden*. Plowd. 345. 2d. resolution; and *Goodright v. Wright*, 1 Str. 25.; and 1 P. Wms. 397. last resolution. The case of *Stead v. Berrier* (c) seems decisive of this case. *R. B.*, having a son *R.*, who also had a son *R.*, devised to *R.* his son and his heirs; *R.* (the son) died in the devisor's life-time; and the devisor afterwards by a codicil devised part of the lands, before given to *R.* his son, to a stranger, and de-

(a) Dougl. 337. 3d. edition.

(b) Ib. 344. n. 4. & 1 Bro. Cb. Cajs. 219. n.

(c) Sir T. Jon. 135. Sir T. Raym. 408. 1 Mod. 267. 2 Mod. 313. 2 Lev. 243. Poll. 546. and 1 Vent. 341.

fixed that the codicil should be made part of his will; he republished his will, and at the same time, *animo testandi*, by words, without writing, declared that his grandson *R.* should take and have "as his father *capere & habere potuisset*." It was held by this Court, on a writ of error from the Common Pleas, that the grandson could not take either under the will, or the codicil, or both together; that, though (according to *Beckford v. Parnecott*, *Cro. Eliz.* 493.) a republication of a will will pass lands purchased after making the will, if the words of the will be apt and proper to pass them, yet that, in the case at bar, it could not have the effect of giving the lands to the grandson, they being devised by the will to his son and his heirs, and that son dying in the devisor's life-time.

Joddrell, for the defendant, argued that, though the devise to *E. Foldson* herself was void in the event that had happened, the children of *E. Foldson* were entitled under the codicil. This is distinguishable from *Goodright v. Wright* and the other cases cited; because here it was the devisor's intention that *E. Foldson*, the devisee, should not bar the entail. It is stated in the case that the devisor knew of the death of *E. Foldson*; and therefore, taking the codicil as a republication of the will, it stands thus; a devise to the heirs of the body of *E. Foldson*, (*E. F.* herself being dead;) then those heirs may take.

Lord KENYON, Ch. J. Nothing can be better established than that if there be a devise to *A.* and his heirs, or to the heirs of his body, or to *A.* in tail, and *A.* die in the life-time of the devisor, the devise is void. It has been thus settled in all the cases, from *Brett v. Rigden* to *Ambrose v. Hodgson*, and *Warner v. White*; and indeed the case of *Ambrose v. Hodgson* was carried up to the House of Lords not on account of doubts entertained by any lawyers concerning the determination of this Court, or of the Court of Chancery, but merely to satisfy the anxiety of the parties themselves. Now, in this case, consider what was the intention of the devisor? He devised to *E. Foldson* and the heirs of her body. She therefore must have taken as a purchaser, and would in the event of her surviving the devisor have had the power of suffering a recovery, and her children must have taken by descent; whereas this is an attempt, on the part of the defendant, to make them take as purchasers, which would alter the course of descent. Then it has been argued that this differs from the former cases cited, on account of the proviso which was inserted in the will to prevent the tenants in tail

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tail suffering a recovery: But that was an impotent attempt by the devisor; for it is not permitted to a party to give an estate to another, and deprive that other of the legal consequences annexed to it. With regard to the codicil; it would operate as a republication of the will for many purposes, such as that of passing lands purchased after making the will, but not so as to alter the will. Now supposing the devisor had by his will given an estate in tail to *E. Foldsom*, and had after *E. Foldsom*'s death republished it by a codicil, that would not have altered the meaning of the words in the will; and the words here used are equivalent to those. If this codicil were sufficient to pass the estate to the representatives of *E. Foldsom*, there never would be a lapsed legacy when there was a republication of the will, but it would always go in favor of the executors of the legatee deceased.

ASHHURST, J. of the same opinion.

BULLER, J. It is admitted that a republication can have no other effect than to let the will stand as if it were made at that time. Then if this will be read as dated at the time of the codicil, it purports to convey an estate tail to a dead person, which is a void devise; for nothing is given by the will to the heirs of *E. Foldsom*, but to *E. Foldsom* herself. Then consider the effect of the circumstance stated in the case, that the devisor knew of the death of his grand-daughter when he made his codicil. Supposing in the first place that he had not known of it, the devise would have been void; therefore the mere circumstance of her being dead would not alone vary the case. Neither can it be material that he did know of it; because if that were to make any difference, it would be saying that something, not apparent on the face of the will, should vary the construction of that which appeared on the will itself (a).

GROSE, J. It is unnecessary to add to what has been already said by the Court; and I will only refer to the words of Lord Ch. J. *Parker*, in *Goodright v. Wright*; where after stating the case and the judgment on the principal point, he says (b) "And thus has the law been long clearly settled as to this point, ever since *Bret* and *Rigden*'s case. But on this occasion I have been the larger in delivering the judgment of the Court; because of some late endeavours to invalidate this rule, which, by the way,

(a) In *Stead v. Berrier*, Sir T. Raymond said "constructions of wills ought to be collected out of the words, and not dehors," or by averment; as 5 Co. 68. *Cienye's* case."
(b) 1 P. Wms. 399.

may make it proper to observe, that the altering settled rules concerning property is the most dangerous way of removing land-marks."

Postea to the Plaintiff.

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ROE on the Demise of CHRISTOPHER JAMES
against D. AVIS and MARY his Wife, ARCHI-
BALD HAY and ELIZABETH his Wife, and
JOHN BARBER and ANN his Wife.

Friday,
May 4th.

ON the trial of this ejectment at the last summer assizes at Hertford, before Gould, J. a special case was reserved for the opinion of this Court. The material facts in this case were these; *J. Beech*, being seised in fee of the premises in question, devised to his wife for life, and after her decease "to be equally divided between his four children, *Henry*, *John*, *Elizabeth*, and *Sarah*, and to each of them and their heirs for ever, share and share alike; and in case they should be minded and agree among themselves to sell the said estate, then every one of his said children should have their equal shares of monies from thence arising: but if they consented and agreed to keep the estate whole together, then and in such case all the rents, issues, and profits, thereof from time to time, as they should become due and payable, should be equally paid and divided between his four children, and to the several and respective heirs of them on their bodies lawfully begotten, share and share alike." *Ann James*, who was the only surviving child and heiress of *Henry Beech*, the eldest son of *J. Beech*, the deviser, and was in possession of the fourth of the estate which her father had, and who survived her husband, by will dated 9th of February 1785, after reciting that she was intitled to one undivided fourth part of a freehold estate at *North Mimms* in the county of *Hertford*, (the estate devised by her grandfather *J. Beech*) devised her said undivided fourth part, share, or interest, of and in the said freehold farm &c. unto *M. Pearson*, and his heirs and assigns, upon trust, (during her mother's life) to pay the rents in thirds to her mother, and her two daughters *Elizabeth James* (since married to *A. Hay*), and *Ann Barber*, or their assigns; from

Under a devise "to *A.* and *B.* and their heirs; and in case they agreed to sell the estate that they should have their equal shares of the money arising therefrom, but if they agreed to keep the estate whole together, then that the rents should be equally paid and divided between them, and to the several and respective heirs of their bodies," *A.* and *B.* took only estates tail. *A.* being seised in fee-tail of an undivided one-fourth part of an estate, and entitled to the reversion in fee of another one-fourth, expectant on the determination of an

estate tail, recited that she was entitled to the first, and devised it to *B. C.* in fee; and then directed "all the residue and remainder of her estate and effects to be sold as soon as might be after her death, and her funeral expences to be paid thereout, and the overplus (if any) to be divided between *D.* and *E.*" held that the reversion did not pass by these general words.

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7 Q Note that Ld Ch. Eldon in
Church v. Mundy 15. Feb. Jun.
405. declared himself dissatis-
fied with this case.

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and after her mother's death, in trust, to receive the rents &c, and to pay and apply the same in equal proportions unto and between her son *Christopher James*, and her said two daughters during their joint lives, and upon the decease of either of her said children to pay and apply the rents &c, unto and between the survivors; and from and after the decease of any two of her said children, then she devised all her said estate, right, and interest, unto the survivors of them, her said son and daughters, his or her heirs or assigns, freed and discharged of and from the aforesaid trust; then followed this clause "and all the rest, residue and remainder of my estate and effects, I direct to be sold and disposed of as soon as may be after my decease, and thereout the expences of my funeral to be paid; and if there shall remain any overplus, the same to be equally divided between my said two daughters." The trustee mentioned in this will claims to hold the said fourth part of the estate so devised to him under the above trusts. *Elizabeth Beech* died without issue in November 1786, and devised the fourth part of the estate which she took under her father's will to her sister *Sarah*. In July 1790 *Sarah* also died, and devised her fourth, as well as the fourth which her sister devised to her, to her niece *Mary*, the wife of *Daniel Avis*. *Mary Avis* was the only surviving child of *John Beech*, the second son of the first deviser, and derived title under her father and elder brother and sisters to the fourth originally devised to her father, and was also possessed of the two-fourths under her aunt *Sarah's* will. The persons entitled to the four parts of the estate devised by the common ancestor *J. Beech* never suffered a recovery or levied a fine of their respective shares. *Christopher James*, the lessor of the plaintiff, was the only son and heir of *Ann James*, the daughter and heiress of *Henry*, the eldest son of *J. Beech*, the first deviser. The defendants were the above named *D. Avis* and *Mary* his wife, *Elizabeth Hay*, and *Ann Barber*, the daughters and devisees of *Ann James*, and their two husbands.

Two questions were made; the first was whether the four children of *J. Beech*, the first deviser, took estates in fee or in tail under his will. It was argued for the defendants that they took a fee under the words of his will, which gave them a power of selling. The other question was whether the general words at the end of *Ann James's* will passed a reversion in two other of the undivided shares, which she never had in possession, and which would only descend to her, on the death of

of her aunts *Elizabeth* and *Sarah*, in the event of the four children of *J. Beech* taking estates tail; for, if they took a fee, those two fourths were devised away from her.

The Court said, on the first point, that the children of *J. Beech* (the common ancestor) took only estates tail in the respective fourths; for though it was given to them and their heirs, and they had also a power of selling the estate, by the former part of the devise, yet the subsequent words "to the several and respective heirs of them on their bodies lawfully begotten" restrained the operation of the former words, and reduced the estate devised to an estate tail.

With regard to the other point, they thought that the two other undivided fourth shares did not pass under the general words of the will of *Ann James*. For, although those general words are sufficient to pass a fee, in order to answer the purposes of a will, yet in this case they said that it was manifest that this remainder was not in the contemplation of the testatrix when she made her will; it being only a reversion expectant on the determination of an estate tail which her aunts might have barred; and the testatrix having, by the former part of her will, disposed of all the freehold estate, to which she supposed herself entitled. They observed that it was clear, from the purpose to which a part of the produce of what she directed to be sold was to be applied, namely, the paying of her funeral expences, that she only meant to dispose of something which could be sold immediately; and that this reversion might never have descended to her heirs.

Per Curiam,

Postea to the plaintiff (a).

Garrow for the plaintiff. *Conste* for the defendants.

(a) So that the lessor of the plaintiff recovered three fourths; one fourth, which descended from *Henry* (the first son of *J. Beech* the common ancestor) to his mother, *Ann James*, and from her to him; and the two-

fourths, originally devised to *Elizabeth* and *Sarah*, the daughters of *J. Beech*, which descended on their respective deaths to the lessor of the plaintiff, as the heir at law of the above named *Henry Beech*.

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*But see Comp.
360. & quare
as to the ground
of decision in
this case.*

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Saturday,
May 5th.The KING *against* JOSEPH BIRCH.

A charter of W. 3., granted to the town of *Liverpool*, directs that the common council-men shall be elected in such manner as was used before a former charter of Car. 2. Defendant, to a *quo warranto* information for exercising the office of common council-man, pleaded that before the charter of Car. 2. the mayor bailiffs and burgeses used to elect (except at those times when there was any bye-law to regulate the mode of election;) The Court held the plea to be bad; because it did not shew what was the usage in fact before the charter of Car. 2.

TO a *quo warranto* information for exercising the office of a common council-man of *Liverpool*, the defendant pleaded that the town or borough of *Liverpool* is and for divers, to wit, 400 years last, has been an ancient town or borough; that the burgeses &c have been during all that time and now are a body corporate &c, by the name of the mayor, bailiffs, and burgeses of *Liverpool*; and that king *Charles* the 1st. on the 4th of *July*, in the second year of his reign, granted them a charter, by which, *inter alia*, they had the power of making bye-laws. That king *William* 3d. in the 7th year of his reign, granted them another charter, which after reciting and confirming the charter of *Charles* 1st, and also reciting that another charter, 29 Car. 2. had been obtained which had created differences and doubts concerning the franchises of the borough and the election of certain offices, &c, granted that there should be a common council of forty-one, to be elected as follows; "that whensoever it should happen that any mayor, recorder, common clerk, or any of the bailiffs or of the common council of the said town for the time being should die, or from his or their office or offices be removed, or depart, or refuse to stand, that then and in every such case another fit person or other fit persons from time to time to and into the office or offices of him or them so removed, or dying, or refusing to stand, should be elected sworn and appointed by such persons, in such manner, time, and form, as in that particular had been used and accustomed before the making of a certain charter of (Car. 2.) and the office or offices, place or places, to which he or they should be so elected and sworn, he or they should exercise for such time, and should be thence removed in such manner, as in like cases in this particular had been used and accustomed before the said charter, &c." That before and at the time of granting the charter of *Charles* the First, (and from thence till the making of the charter of the 29 Car. 2.) there existed within the said town a certain select body of the burgeses, who were called the common council &c; and that during all that time whenever the place or office of a common council-man of the borough happened to be vacant, another fit person was used and accustomed to be elected and appointed into the said place or office from the burgeses or freemen

of the said borough for the time being by the mayor bailiffs and burgeses of the said borough for the time being (except at such times when such election hath been otherwise regulated, directed, and appointed by any bye-law in that behalf made and then in force;) and that during all the time last aforesaid, and before the charter of *Car. 2.*, there were divers times when no bye-law of the said borough in anywise regulating, directing, or ordering, the election of a common council-man existed, or was in force. The defendant then pleaded an election into the office of a common council-man, on a vacancy in *November 1791*, by the mayor bailiffs and burgeses; averring that at the time of his election there was no bye-law regulating or directing the election of common council-men in existence.

To this plea there was a demurrer.

Wood, in support of the demurrer, contended that the plea was bad, because the defendant had not alleged positively in what manner the election of a common council-man was made before the charter of *Car. 2.*; for he had introduced in the usage an exception, which is as large as the usage itself, and destroys it. The charter of *Will. 3.* refers to an *usage in fact*: how that usage originated, whether in a bye-law or otherwise, is immaterial. The charter by referring to and adopting it has given it the same force as if it were therein incorporated. But, it not being stated in the charter what the old usage was, the defendant should have averred in positive terms what he conceived that usage to have been, on which he intended to rely; instead of which he has only stated that before the charter of *Car. 2.* the common council-men were chosen by the mayor bailiffs and burgeses at large, except when they were elected in some other manner: this mode of pleading therefore is altogether inconclusive, and bad.

Gibbs, contra. The charter of *W. 3.* refers to the *right* of election, as it existed before the charter of *Car. 2.*; and whatever that right was, it was adopted by the charter of *W. 3.* According to the argument of the other side, that this latter charter related merely to the usage in fact before the charter of *Car. 2.*, it would follow that the mode of election might be governed by the last election which had in fact taken place immediately preceding that charter, although directly contrary to the usage which had prevailed for ages before. Suppose the last election before the charter of *W. 3.* had been made by a select body under a bye-law, which bye-law had been made between that

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and the election immediately preceding it, when the corporation at large had elected, it could never have been intended that such a mode of election was to be adopted by the charter of *W. 3.*, because it says that the common council-men shall be elected by such persons, and in such manner &c, as had been used and accustomed before the charter of *Car. 2.*; and it cannot be contended that such an instance as that would amount to an usage.

LORD KENYON, Ch. J. Suppose an usage had prevailed for two centuries before the charter of *Charles the Second*, for a select body to make the election under a bye-law, evidence of that would be excluded by this mode of pleading; for the jury could not enquire how long such an usage had prevailed, if it originated under a bye-law.

BULLER, J. The defendant should have shewn precisely in his plea what was the usage in fact before the charter of *Charles the Second* that the other party might know on what fact to go down to trial. He has only stated that before that charter the usage was for the mayor bailiffs and burgeses to elect, except at those times when there was a bye-law in force to vary the mode of election: but he has not said in his plea whether or not there existed at that time any bye-law.

GROSE, J. The charter of *Will. 3.* refers to the usage in fact before the charter of *Charles the Second*, however it may have originated.

Gibbs then asked leave to amend the plea; which the Court said might be done under the authority of a case from *Yarmouth (a)*.

(a) *Vid. R. v. Blackford, 4 Burr. 2147.*

Monday,
May 7th.

OXLADE against DAVIDSON.

A bill of
Middlesex
may be re-
turnable the
same day that
it is sued
out.

THE bill of *Middlesex* in this case was sued out on the 13th of *February* last, returnable on the same day; for which reason a rule was obtained calling on the plaintiff to shew cause why the writ and the subsequent proceedings should not be set aside, on the authority of *Green v. Rivet (a)*, where it was said that a bill of *Middlesex* could not be returnable the same day that it was sued out.

(a) 2 *Ld. Raym.* 772.

On

On shewing cause against this rule it was said that whatever might have been the practice formerly, it was in every day's experience now to sue out writs, returnable as the present is; and that the Court had repeatedly refused to set aside such writs.

Per Curiam. The practice is as has been stated by the plaintiff's counsel. But, as the defendant was misled by the case in *Lord Raymond*, they

Discharged the rule without costs.

ALEXANDER *against* MACAULEY and Another.

Monday,
May 7th.

THIS was an action upon the case against the defendants, as sheriffs, for an escape. The declaration stated that the plaintiff had a good cause of action against his creditor, that he sued out a *latitat* against him, that he was arrested by the defendants &c; and that the defendants suffered him to escape &c. At the trial before Lord *Kenyon* the plaintiff was nonsuited, because he could not prove any debt against the prisoner who had escaped.

In an action against the sheriff for the escape of a prisoner on mesne process, the plaintiff was nonsuited, because he could not prove any debt against the prisoner who escaped.

Shepherd moved on a former day for a rule to shew cause why the non-suit should not be set aside, on the ground that, at all events, the plaintiff was entitled to nominal damages. Cause was now shewn by

Erskine and *Wigley*; who relied on the case of *Gunter v. Cleyton* (a) as deciding the present.

The Court were clearly of opinion, on the authority of the case cited, that the non-suit was right.

Rule discharged.

(a) 2 Lev. 85.

GORDON *against* AUSTIN and Others.

Monday,
May, 7th.

THIS was an action on a promissory note made by the firm of *Austin Strobell* and *Shirtliff*, who were declared against by the names of *William Austin*, *Robert Strobell* and *William Shirtliff*; the two last of whom were stated to be outlawed. The defendant *Austin* pleaded *non assumpsit*. At the trial before Lord *Kenyon* at *Guildhall*, the note was given in evidence signed by the name of the firm in the manner first mentioned; and it was proved that the partnership consisted of the present defendant *William Austin*, *Daniel Strobell*, and *William Shirtliff*; whereupon

In an action against three on a promissory note, two of whom are stated to be outlawed, the third may take advantage of the misnomer of his companions upon the general issue, on the ground

of a variance between the contract declared upon and that proved.
it

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it was contended that the plaintiff ought to be non-suited on the ground of a variance between the contract declared upon and that proved; it appearing to be between different persons. The cause however was suffered to proceed, and a verdict was taken for the plaintiff. To set aside which

Russell obtained a rule *nisi* on a former day on the same ground that he had maintained at the trial, and the case of *Shovel v. Evance* (a) was cited.

Erskine now shewed cause; insisting that the defendant *Austin*, who was properly described in the declaration, could not take advantage of this variance with respect to the names of the other parties upon the plea of the general issue. Such an objection can only be pleaded in abatement by the parties misnamed. But *Austin* alone having pleaded the general issue upon the record, the question at *nisi prius* was whether *he* had promised or not: the proceedings were no longer joint, but were severed by the outlawry. As to the case of *Shovel v. Evance*, if the party cannot plead the misnomer of his companion, still less shall he be permitted to avail himself of it on the general issue.

Russell, *contra*, was stopped by the Court.

LORD KENYON, Ch. J. At the trial I considered this like a misnomer of a defendant, who must in general cases plead in abatement. But on further consideration I am of opinion that, as this is an action on a written instrument, the objection was well founded at *nisi prius*, because the evidence produced did not prove the instrument declared on.

BULLER, J. If this case be considered without the outlawry, it is perfectly clear; and the outlawry is only stated as an excuse on the record for not proceeding against the party outlawed. Then it stands thus; the plaintiff declared upon a note given by three persons, describing them; and the note given in evidence was made by different persons; the evidence therefore did not support the contract declared upon.

Per Curiam

Rule absolute.

(a) 1 Lutw. 36.

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LE GRANGE *against* HAMILTON.Monday,
May 7th.

TO debt on bond, the defendant, after craving oyer of the condition and of a memorandum indorsed thereon, pleaded usury. The condition of the bond was for the payment of 100*l.* with interest at 5*l. per cent.*, in payments of 20*l.* yearly, by four quarterly payments of 5*l.* each until the whole should be paid. The indorsement was as follows; "That it is the true intent and meaning of the parties that at the expiration of each and every year, *the year's interest due* is to be added to the principal sum; and then the 20*l.* received during the course of the year to be deducted, and the balance to remain as principal, and so continue yearly until both principal and interest be fully paid." At the trial at *Guildhall* before Lord *Kenyon*, the defendant obtained a verdict; to set which aside a rule *nisi* was granted in the beginning of this term on the ground that the memorandum did not disclose an usurious contract.

A memorandum indorsed on a bond, which was conditioned for the payment of 100*l.* by quarterly payments of 5*l.* each, and interest at 5*l. per cent.*, "that at the end of each year *the year's interest due* was to be added to the principal, and then the 20*l.* received in the course of the year was to be deducted, and the balance to remain as principal", was held not to be usurious.

Bower and *Reader* now shewed cause; contending that this appeared to be usury upon the face of the memorandum, which was to be taken as part of the original transaction. For the obligee would by this agreement have, over and above the interest of 5*l. per cent.* upon the whole sum, the further interest which might accrue upon the respective quarterly payments made in the course of the year. By the terms of the contract the parties were to come to a settlement at the end of the year, when *the year's interest* was to be added, which can only mean the year's interest on the whole sum; for no other is specified: and this is to be done, notwithstanding part of the principal had been before paid. No deduction was to be made on account of those payments until the year's interest had been paid: for the memorandum says that, after the year's interest had been added, then the quarterly payments are to be deducted. Besides, if this were not the intention of the parties, the memorandum would be altogether nugatory, and would not have been added.

Erskine and *Gibbs*, *contra*. The argument on the other side is founded upon the omission of the word "*due*" in the memorandum, and the addition of the words "*upon the whole sum.*" The words of the memorandum are "*the year's interest due* is to be added to the principal sum;" and that is supposed to mean "*the year's interest upon the whole sum*". Now the word "*due*" must be taken to confine the meaning to what interest should by

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law be due at the end of the year, which of course excludes the interest upon those sums which had been paid in part reduction of the principal during the course of the year. And "the year's interest" only means that interest which had accrued during the course of the year on the respective sums remaining in the hands of the obligor. Supposing there had been no statute against usury, and the parties had without reference to such a question set down to calculate what was due upon this bond at the end of the year; they would first have calculated interest upon the whole sum up to the first quarter, then deducting 5% they would have calculated interest on the remaining sum to the second quarter, and so on. It could not have been conceived, unless it had been so expressed, that interest was still to be allowed upon the money which had been paid; and there is nothing in this contract to entitle the obligee to receive interest for any sum which had been repaid to him. Neither would it follow that the memorandum would be nugatory according to this construction; for it was made for the purpose of adding the interest to the principal at the end of the year, which would not otherwise have been the case under the bond and condition. But supposing the words of the memorandum to be doubtful, and that they are capable of receiving two different constructions, the Court will rather presume that the parties meant to enter into a legal than an illegal contract; especially too as the memorandum must be taken with reference to the bond and condition, and nothing appears there but what is perfectly legal.

Lord KENYON, Ch. J. Without being inclined to strain the words of this memorandum, either to involve the plaintiff in the crime of usury or to exempt him from it, I am bound to read the whole of it as any other person would do; and from that I am to collect the intention of the parties. It is admitted that if they intended that the computation of interest should be made on the whole sum of 100*l.* to the end of the year, notwithstanding the several parts of the principal had been paid at the stated periods, it would be usury. And the only question is whether it was the intention of the parties to this memorandum that interest should be paid for the whole sum down to the end of the year, though during the course of that year that sum had been reduced by three quarterly payments. Now supposing the parties were sitting down at the end of the year to calculate what was due, (without regard to the statutes of usury,) they would have computed the interest due for the year, and added that to the principal:

principal: that is the first thing which the parties agreed to do; and they were to do this, without considering what had passed in the course of the year; these joint sums therefore at the end of the year would have amounted to 105 £; and *then* (by the very terms of the contract) the 20 £. received in the course of the year would have been deducted. This is the plain meaning of the memorandum; for the deduction is not to be made until the interest of the whole sum has been added to the principal. And it strikes me that the memorandum was added for no other purpose; the condition of the bond left nothing obscure; if it were intended to be fair and legal, it wanted no explanation; the reduction of the principal would have followed of course from the payment of the several quarterly portions. It cannot be supposed that the memorandum was to have no operation whatever: and if it have any, I think it discloses an usurious contract.

ASHHURST, J. If the court can by any reasonable construction consider this not to be usury, they are bound to do so. The memorandum appears to have been made for the purpose of adding the interest, which became due in the course of the year, to the principal, so as to make the whole carry interest till part of it was again reduced, which could not have been done on the condition of the bond alone. The intention of the parties seems to have been this; if at the end of the year, when they came to a settlement of accounts, 20 £. had been paid by four quarterly payments, they were to calculate the interest which accrued due in the course of the year; for the first quarter there would be interest on the whole sum, for the second, interest on the whole, minus the sum already paid; and so on for the third and fourth quarters; and whatever that interest was, it was to be added to the principal. This appears to be the fair construction of the memorandum; and I think we are not necessarily to put the construction on it contended for by the defendant, because that would make the contract usurious.

BULLER, J. I think we must take the condition and the memorandum into consideration together; for they form only one contract. Now nothing can be clearer than the condition itself; it was merely to secure payment of the principal and interest: and the memorandum does not purport to be a new agreement, it only provides for the mode in which that principal and interest are to be paid. If this were considered without any reference to the statutes of usury, and the question had arisen on

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the mode of payment upon this contract, it would have been sufficient for the defendant to have shewn that he had paid interest for the respective sums which had remained in his hands during the different quarters in the year; for the memorandum would not give the plaintiff a right to demand more than that. According to the defendant's argument, notwithstanding parts of the principal may have been paid during the course of the year, yet the interest is to be calculated upon the whole sum for the whole year; but that is not warranted by the words of the memorandum. The words are "the year's interest due"; which mean the interest which accrued due in the course of the year on the sums remaining in the defendant's hands, and not on the money which he has paid. And the memorandum was added merely for the purpose of adding the interest to the principal, so that the accumulated sum should carry interest in future. If the parties to this memorandum were at liberty to make rests, there is an end of the question; and I think they might do so. But even if the words of the memorandum were equivocal, then we must resort to the condition, which is part of the same agreement, and which is clearly not usurious.

GROSE, J. If we can put a legal construction on this memorandum, we are bound to do so. Then the question is whether it will not fairly bear this construction, that the interest only of the respective sums in hand during the different quarters should be added to the principal at the end of the year; I think it will, And if so, it is admitted that it is not usurious.

Rule absolute.

Monday,
May 7th.

ANKERSTEIN against CLARKE and Others.

If a bond be given to husband and wife administratrix, the husband alone may declare on it, as on a bond made to himself.

THE plaintiff declared on a bond as given by the defendants' testator to himself. The defendants pleaded the general issue; and at the trial the bond, when produced, appeared to be given to the plaintiff and his wife, administratrix of *A. B.* For the defendants it was objected that the bond produced varied from that declared on; and the plaintiff was non-suited.

Shepherd on a former day obtained a rule to shew cause why the non-suit should not be set aside; insisting, on the authority of the following cases, that the husband might either join with his wife, or sue alone; and that in all cases a party might declare on a deed according to it's legal import; *Bro. Abr. "Baron and Feme"*

pl. 55.

pl. 55; Hilliard v. Hambridge, All. 36. Sty. 9. S. C. Holdwick v. Chafe, All. 41. Sir J. Brett v. Cumberland, 3 Bulst. 163. Howell v. Maine, 3 Lev. 403. Beaver v. Lane, 2 Mod. 217. and Aleberry v. Walby, 1 Str. 230.

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When this rule was now called on

BULLER, J. said he had looked into the cases cited, and found that some of them, namely, 3 *Lev.* 403; 1 *Str.* 229; and 2 *Mod.* 217. were decisive of this question; particularly the last, where the husband alone brought an action on a covenant made to himself and his wife; and after a motion in arrest of judgment the Court gave judgment for the plaintiff; saying "the indenture being by baron and feme, it was therefore true that it was by the baron; and the action being brought upon a covenant concerning his houses, and going with them, though it be made to him and his wife, yet he may refuse *quoad* her, and bring the action alone." And the Ch. Justice there said "That he remembered an authority in an old book, that if a bond be given to baron and feme, the husband shall bring the action alone; which shall be looked upon to be his refusal as to her."

Russell, who was to have shewn cause against this rule, then attempted to distinguish this case from those cited, by saying that here the bond was given to the husband and wife, *administratrix*; and that if it were given to her *as administratrix*, and she died, it would not survive to the husband. But

Lord KENYON, Ch. J. said, that would make no difference; for that the husband might reduce all the assets into possession, and would only be liable on a *devastavit* if he did not pay the debts &c of the intestate.

Per Curiam,

Rule absolute.

FOSTER *against* PIERSON.

Friday,
May 11th.

THIS was an action of covenant. The declaration stated a lease granted by the defendant to *Charles Broughton*, under whom the plaintiff derived title by several assignments; in the lease the defendant covenanted for quiet enjoyment, "without the let, suit, trouble, molestation, or interruption of him (the defendant) his heirs and assigns, or of any other person or persons whomsoever." It then set forth this breach; "That the defendant at the time of making of the said last mentioned indenture, and demise, or at any time before or afterwards hitherto had not

In assigning a breach of covenant, which was for quiet enjoyment, it is sufficient to allege that at the time of the demise to the plaintiff *A. B.* had lawful right and title to the

premises, and having such lawful right and title entered &c. and evicted him, &c; without shewing what title *A. B.* had; or that he evicted the plaintiff by legal process, &c.

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any right or title whatsoever to make the said demise of the said premises to the said *Charles Broughton*, nor could the said plaintiff by virtue of the said demise since the said assignment so made to him as aforesaid peaceably and quietly have, hold, occupy, possess, and enjoy, the said demised and assigned premises, or any part thereof; for that one *James Bradshaw Pierston* the younger, at the time of making the said indenture first into court brought, and continually from thence until and at the time of the eviction and expulsion herein after mentioned, *had lawful right and title* to the premises in and by the said indenture first into court brought demised; and the said *James Bradshaw Pierston* the younger, *having such lawful right and title* to the said premises in and by the said indenture first into court brought demised, after the said assignment thereof to the said plaintiff, to wit, on the 1st day of *May* in the year 1791 *entered* into and upon the said premises with the appurtenances in and by the said indenture first into court brought demised in and upon the said possession of him the said plaintiff thereof, and ejected, expelled, put out, and amoved, the said plaintiff from and out of the possession thereof, and hath kept and continued him so thereout ejected, expelled, and amoved, from thence for a long time, to wit, from thence until the day of exhibiting his bill in this behalf; whereby the said plaintiff hath not only lost and been deprived of the use and benefit and advantage of the said premises, but hath also been forced and obliged to lay out and expend, and hath actually laid out and expended, a large sum of money to wit the sum of 200*l*, in and about his endeavouring to defend his possession of the said premises, against the said *James Bradshaw Pierston* the younger, to wit, at &c; contrary to the form and effect of the said indenture of demise so made to the said *Charles Broughton* and his assigns by the said defendant, and of the said covenant of the said defendant so made to the said *Charles Broughton* the elder and his assigns in that behalf as aforesaid;” and so &c.

To this declaration the defendant demurred, and shewed these causes; that it did not appear in and by the declaration that *James Bradshaw Pierston* the younger had at any time before, or at the time of, the said entry and supposed eviction in the declaration mentioned, established or shewn his right claim or title to the said premises &c so assigned to him the plaintiff as aforesaid, by or in pursuance of or under any legal process of law; and that it did not appear in or by the declaration that *James Bradshaw Pierston*

Pierſon the younger ſo entered into and upon the ſaid premiſes &c and in and upon the poſſeſſion of him the plaintiff thereof, by virtue or in purſuance of or under any legal or juſt proceſs of law; whereas if *James Bradſhaw Pierſon* the younger had at any time entered into and upon the ſaid demiſed premiſes &c, in or upon the poſſeſſion of him the plaintiff, and evicted put out or amoved him the plaintiff therefrom, it ſhould and ought to have been ſtated and ſhewn in and by the declaration that the ſame was by, under, or in purſuance of, legal proceſs of ejectment, or other lawful action; and that it did not ſufficiently appear in or by the declaration what right, claim, or title, (if any) *James Bradſhaw Pierſon* the younger at any time before or at the time he ſo entered as aforeſaid, or at any time ſince, had to enter in or upon the ſaid demiſed premiſes in or upon the ſaid poſſeſſion of him the plaintiff, and evict and expel him the plaintiff therefrom; &c.

Chambre, in ſupport of the demurrer. The plaintiff, in alleging the eviction, ſhould have ſhewn the title of *J. B. Pierſon*, or at leaſt ſhould have averred that *J. B. Pierſon* had ſuch a title as was inconſiſtent with the plaintiff's title to poſſeſs theſe premiſes. For though this covenant is not only againſt the acts of the leſſor himſelf, but alſo of all perſons whomſoever, it muſt be conſtrued to extend only to the acts of thoſe who have lawful title, and not to wrong-doers. *Dudley v. Folliott*, ante 3 vol. 584. In *Tiſdale v. Sir W. Eſſex* (a), in an action on a covenant for quiet enjoyment, the breach was that one *H. Elſing* entered upon the plaintiff and ejected him; it was objected on demurrer that *Elſing's* entry muſt be taken to be by wrong, and therefore that it was no breach of the covenant; and the Court were of that opinion. Again, in *Jordan v. Twells* (b) the plaintiff brought debt on a covenant for rent; to which the defendant pleaded that before the rent became due, One *K. P.*, having a prior and better right and title to the premiſes than had been granted to the defendant, againſt his will entered into the premiſes, and by due proceſs and courſe of law expelled and evicted the defendant: To this there was a demurrer, becauſe the defendant did not ſet forth what right or title *K. P.* had &c; The Court allowed the objection, on the ground that the defendant ought to have alleged a title in *K. P.* inconſiſtent with the plaintiff's title; and Lord *Hardwicke* ſaid "The defendant ought to have ſhewn that *K. B.* had a title to enter; for poſſibly

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she had no right of *entry*, though she had a right to recover in a real action." So here, though it be alleged "that *J. B. Pierſon* had lawful right and title to the premises," he might only have had a title to recover in a real action, and no right of entry. The mischief to be apprehended from permitting this loose mode of pleading is that it may give a cover to an eviction by collusion. And in the last case cited Lord *Hardwicke* said, "for ought appears, this eviction might be by collusion" (a).

Lambe, *contra*, admitted that the covenant only extended to those who had title, but said that it appeared from all the old cases that it was sufficient in pleading an eviction to allege in general terms that, having an older and good title, he evicted, &c, without shewing what that title was; *Dyer* 328. *a. marg.* *Forte* and *Vine's* case, 2 *Rol. Rep.* 21; *Wootton v. Hele*, 2 *Saund.* 180; 1 *Lev.* 301, 1 *Sid.* 466. 1 *Mod.* 294; *Skinner v. Kilbys*, 1 *Show.* 70; *Proctor v. Newton*, 2 *Lev.* 37; and *Buckley v. Williams*, 3 *Lev.* 325. And that, according to some of the precedents, the plaintiff need only have stated the breach in the words of the covenant, without shewing the entry of any one; *Brudshaw's* case; 9 *Rep.* 60. *b. Co. Entr.* 117. and *Glinister v. Audley*. Sir *Thomas Raymond*, 14.

Chambre, in reply. Though perhaps it would have been sufficient for the plaintiff to have alleged the breach in the words of the covenant, yet having undertaken to shew *how* the covenant was broken, he is precluded from going into any other circumstances than those relied on, according to the case of *Mantle v. Harris* (b); and the mode in which he has pleaded the eviction is incorrect, in not shewing that *J. B. Pierſon* had a right to enter. The case of *Jordan v. Twells* is subsequent to all those cited by the defendant, and is express to this point: To which it may be added that the objection respecting the right of entry was not taken in those cases.

LORD KENYON, Ch. J. If the declaration be certain to a common intent, that is sufficient. Now it states that *J. B. Pierſon* at the time of the lease made to the plaintiff, and at the time of the eviction, had lawful right and title to the premises; and having such lawful right and title entered &c. I think it would be doing violence to these words to say that the lawful right and title, which it is stated he had, did not legalize his entry: the fair

(a) The objection, that it was not stated
that the plaintiff was evicted by legal pro-
cess, was abandoned; the precedents being

against it.

(b) *Ante* 3 vol. 307.

import of the words is that he had lawful right and title to do that which he did. The other objection, that it is not stated that the plaintiff was evicted by due course of law, is abandoned: but I do not see any reason why the plaintiff did not make that allegation, for he states that he was at the expence of 200 *l.* in defending his possession.

ASHHURST, J. The breach, though not accurately drawn, implies that the plaintiff was lawfully evicted, so as to bring the case within the meaning of the covenant. For, in substance, it is this; that the person who entered had a better title than the defendant, and having such title entered upon the plaintiff.

BULLER, J. In assigning a breach of covenant, it is sufficient if it be certain to a general intent. And I think that this is sufficiently certain; for when it is said that "the party having a lawful right and title entered," it is the same as saying "He entered by lawful right and title." And at the trial the plaintiff would have failed in proving this allegation, unless he had shewn a right of entry in *J. B. Pierston*.

GROSE, J. In several of the cases the breach is assigned in the manner that this is. In 1 *Mod.* 294. *Twisden*, J. said, it is sufficient to say that the party had a *prior title*; not a prior title to enter. And in 1 *Mod.* 101. Lord *Hale* said "having title at the time" is sufficient.

Judgment for the plaintiff.

FARR and Others *against* NEWMAN and Another.

Monday,
May 14th.

THIS was an action upon the case against the defendants, as sheriff of *Middlesex*, for making a false return to a writ of *feri facias*. The declaration stated that the plaintiffs in *Easter* 30 *Geo.* 3. recovered a judgment in this court against *T. Watts*, and *A. Reid* and *Ann* his wife, which said *T. Watts* and *Ann Reid* were the executor and executrix of *W. Lewer* deceased, for 236 *l.* 10 *s.* to be levied of the goods and chattels which were of *W. Lewer* at the time of his death in the hands of *Watts* and *Ann Reid*, to be administered, if they had so much of the goods and chattels of *W. Lewer* to be administered, and if they had not, then the sum of 32 *l.* 10 *s.* parcel of the damages, being for the costs &c, to be levied of the proper goods and chattels of *A. Reid* and *Ann* his wife. That before the issuing of the writ after mentioned the plaintiffs obtained satisfaction of a part of the damages so recovered, but at the time

Goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right.

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of issuing the writ there remained 114*l.* 12*s.* due to them. That for the obtaining of the said 114*l.* 12*s.* the plaintiffs on the 17th of *May* in the 30th year *Ec.* sued out a *fieri facias* directed to the sheriff, by which he was commanded to levy 114*l.* 12*s.* of the goods which were of the said *W. Lewer* at the time of his death in the hands of the said *A. Reid* and *Ann* his wife to be administered, and if she had not so much thereof in her hands, then to levy 32*l.* 12*s.* (being the costs *Ec.*) of the goods of the said *A. Reid* and *Ann* his wife. That that writ afterwards, and before the return of it, on the 28th of *May* 1790, was delivered to the defendants to be executed; by virtue whereof the defendants on the day last mentioned seized the goods which were of *W. Lewer* at the time of his death in the hands of *A. Reid* and *Ann* his wife to be administered, to the value of the residue of the damages so recovered *Ec.*, and then and there sold the same, and thereof levied the residue of the said damages so recovered; yet that the defendants falsely and deceitfully returned on the said writ that there were not any goods in their bailiwick, which were of *W. Lewer* at the time of his death in the hands of *A. Reid* and *Ann* his wife to be administered, whereof they could cause to be levied the said damages *Ec.*; and that *A. Reid* and *Ann* his wife had not any proper goods or chattels in the defendants' bailiwick, whereof they could cause to be levied the costs *Ec.*

The defendants pleaded the general issue. At the trial at *Westminster* before Lord *Kenyon* the jury found a special verdict (a) (in substance) as follows.

That the plaintiffs in *Easter* term 30 *Geo.* 3. recovered a judgment against *T. Watts* and *A. Reid* and *Ann* his wife, as executors of *W. Lewer*, for 236*l.* 10*s.*, as stated in the declaration. That part of it was afterwards paid to them; and that for the residue 114*l.* 12*s.* they sued out a *fieri facias*, as stated also in the declaration; which was delivered to the defendants, as sheriff, on the 28th of *May* 1790, to be executed. That in *Easter* term 1790, one *William Wilson* recovered a judgment in this court against *Alexander Reid* for 1047*l.* debt, and also 63*s.* for his damages and costs; which judgment was signed on the 27th of *May* 1790. That on the 28th of *May* 1790, *Wilson* sued out of this court a certain writ, bearing *teste* the 17th of *May* 1790 upon the last mentioned judgment, directed to the

(a) At first only a special case was found: | for the purpose of enquiring whether there
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then sheriff of *Middlesex*; by which writ the sheriff was commanded to levy of the goods and chattels which were of the said *Alexander Reid* in his the said sheriff's bailiwick, 1047*l.* which *William Wilson* lately recovered against *Alexander Reid* for a debt, and also 63*s.* for damages and costs &c. That the last writ was also returnable on *Friday* next after the Morrow of the Holy *Trinity*, and was indorsed to levy 552*l.* 14*s.* 6*d.* besides sheriff's poundage, officers' fees, and costs of levying. That the last mentioned writ was afterwards on the same 28th of *May* 1790, (being before the return thereof) and a few hours before the delivery of the said writ of the plaintiffs to the sheriff as aforesaid, delivered to the defendants then sheriff of *Middlesex*, to be executed. "That the defendants as sheriff on the day and year last mentioned, (a few hours before the delivery of the said writ of the plaintiffs for the purpose aforesaid) by virtue or under colour of the said writ at the suit of *William Wilson* at *Westminster* aforesaid, in the said sheriff's bailiwick, seized certain goods and chattels to the value of 200*l.* then being in a certain house wherein *Alexander Reid* and *Ann* his wife then resided, and in which house *W. Lewer* before and at the time of his death resided; and which said goods and chattels were the goods and chattels of *W. Lewer* deceased at the time of his death, and were in the hands of the said *Alexander Reid* and *Ann* his wife." That on the said 28th day of *May* 1790 at *Westminster* aforesaid, after the said sheriff had so seized the said goods and chattels, the within mentioned *C. G. G.* the plaintiffs' attorney, gave notice in writing to *Wilson's* attorney, and to the defendants, "that the said goods and chattels so seized were the goods and chattels of *W. Lewer* deceased at the time of his death, and not the goods of *Alexander Reid*; and that *Ann Reid* the wife of *Alexander Reid* was executrix, and *T. Watts* executor of *W. Lewer*, and had proved his will; that *Alexander Reid* and *Ann* his wife were in possession of the same, and that the same were assets in their hands for the payment of the debts of *W. Lewer*; that such assets were liable for the payment of the aforesaid sum of 114*l.* 12*s.* recovered by the plaintiffs; and also that such assets were liable to the payment of a sum of 116*l.* 10*s.* 4*d.* recovered against the same parties as executors in the said court of King's Bench of *Easter* term then last by *F. Stedman*; that such assets were not liable to the payment of any debts of *Alexander Reid*, the same not being sufficient to satisfy the said judgments, and other the just debts of *W. Lewer*; and

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and further that he C. G. G. as attorney for the respective plaintiffs meant to take out, and was about taking out, executions upon the judgments aforesaid, to levy the goods aforesaid, being such assets; and that unless they immediately quitted possession, one or more actions would be brought against them." That the said C. G. G. as attorney for the plaintiffs soon afterwards, on the said 28th of May 1790, procured a warrant from the defendants, dated the day and year last aforesaid, on the within mentioned writ of execution at the suit of the plaintiffs, which had been delivered to the sheriff to be executed, directed to P. Cawdron, an officer of the defendants, whereby the said sheriff commanded P. Cawdron to levy 114*l.* &c, pursuant to the directions of the writ &c. That P. Cawdron, the officer, went with the said warrant into the aforesaid house, where the goods and chattels so seized as aforesaid were before the said goods and chattels or any part thereof were sold or removed out of the said house, and there saw the same; but did not levy thereon. "That the goods so seized were of the value of 200*l.* and that the same had been, and were at the time of the death of W. Lewer, his property, and that his widow Ann Lewer took possession of the house and effects as executrix of his last will and testament; that whilst she was so possessed thereof, she intermarried with the said Alexander Reid; and that they after such intermarriage continued in possession of the said house, goods, and chattels, till the said sheriff so seized the said goods and chattels. That the said goods and chattels remained in the house aforesaid, possessed by the testator W. Lewer at the time of his death; and that under the said writ of execution the same were seized for the proper debt of the said A. Reid." That the defendants, being sheriff at the time of the return of the writ within mentioned, at the suit of the plaintiffs, did not cause to be levied the said 114*l.* 12*s.* or any part thereof, nor had they or either of them at the return of the said writ, the said 114*l.* 12*s.* or any part thereof, &c; nor have they nor hath either of them paid to the plaintiffs, or to any or either of them, the said residue of the said damages &c. And that the defendants, at the return of the writ, returned on the said writ in manner and form as by the plaintiffs is within in that behalf alleged. By means of which said premises the plaintiffs are and have been greatly retarded and hindered from obtaining of the said residue of their damages &c, recovered, &c. But whether upon the whole &c.

This special verdict was twice argued; the first time in *Trinity* term 1791, by *Morgan* for the plaintiffs, and *Wood* for the defendants; the second in *Michaelmas* term last, by *Bearcroft* for the plaintiffs, and *Erskine* for the defendants.

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For the plaintiffs two points were made; 1st, That the testator's goods could not be taken under an execution for a debt of the executor's; to prove which were cited *Crane v. Drake*, 2 *Vern.* 616. 1 *Eq. Cas. Abr.* 240; *Ellis's Case*, 1 *Atk.* 101; 3 *Burr.* 1369; and 1 *Com. Dig.* 259; 2dly, That they could not be taken for the debt of the husband of the executrix; *Bro. Abr.* title "*Baron and Feme*," pl. 84. *ib.* title "*Administrator*," pl. 38. *Norton v. Sprigg*, 1 *Vern.* 309; *Bachelor v. Bean*, 2 *Vern.* 61; 1 *Com. Dig.* 269; *Wentw. Off. Exec.* 298; and 1 *Com. Dig.* 570.

In answer to the first, the following cases were relied on by the defendants' counsel; *Hoyle v. Lundon*, 3 *Keb.* 839; *Elliot v. Merryman*, 3 *Barnard.* 81; *Nugent v. Gifford*, 1 *Atk.* 463; *Russell's Case*, 5 *Rep.* 27; 2 *Vez.* 268; and *Whale v. Booth* (a).

And

(a) *Whale v. Sir Charles Booth Knight*. M. 25 Geo. 3. B. R. Action against the sheriff for a false return. Verdict for the plaintiff, damages 35 *l.* at all events, and a farther verdict for 368 *l.* subject to the opinion of the Court on a case reserved.

William Woodham in his life-time, and at the time of his death, was indebted by bond to the plaintiff in the penal sum of 800 *l.* conditioned for the payment of 400 *l.* with interest. *William Woodham* died three years ago, leaving his two sons *William* and *John* his executors, who on his death possessed themselves of the stock on his farm, and other personal effects to a much greater amount than the money due on the bond. The plaintiff obtained judgment for the said sum, and 35 *l.* for costs. On a *feri facias* sued out, the sheriff returned *nulla bona*. It appeared in evidence that the executors were indebted to their uncle to the amount of 800 *l.* and confessed judgment; upon which a *fi. fa.* issued; and goods were levied both of the testator and of the executors for satisfaction of that judgment. The case stated that the uncle knew the goods levied were the goods of the testator. The question was whether under the circumstances of this case the executors had so far conveyed away the goods of the testator as to deprive the plaintiff of levying her debt upon the said goods.

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After argument by *Fond* for the plaintiff, and *Garrow* for the defendant.

Lord *Mansfield*, Ch. J. said, The general rule both of law and equity is clear, that an executor may dispose of the assets of the testator; that over them he has an absolute power: and that they cannot be followed by the testator's creditors. It would be monstrous, if it were otherwise; for then no one would deal with an executor. He must sell in order to effect the will; but who would buy if liable to be called to an account. It is also clear, that if at the time of alienation, the purchaser knows they are assets, this is no evidence of fraud; for all the testator's debts may have been already satisfied; or if he knows that the debts are not all satisfied, must he look to the application of the money? No one would buy on such terms. There is one exception indeed, where a contrivance appears between the purchaser and executor to make a *devastavit*. But nothing of that sort appears here; for the alienation is by execution and a bill of sale. The testator died three years before this transaction; and if the executors paid all demands, the assets belong to them. No demand was made by the plaintiff during all that time; and long before any demand was made, a fair creditor of their own sued out execution. As to fraud there is none. It is stated, indeed, they

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And in answer to the second, these two; *Arnold v. Bidgood*, *Cro. Jac.* 318; *Thrustout v. Coppin*, 3 *Wilf.* 277; and 2 *Bl. Rep.* 801.

The Court took time to consider of their judgment; and now there being a difference of opinion on the bench,

GROSE, J. delivered his first.

The question upon all these counts is, whether the defendants as sheriffs have made a false return to the plaintiffs' writ; that is, whether there were any goods of the testator in the hands of *Reid* and his wife to be administered at the time the sheriffs received the plaintiffs' writ of *feri facias*. The material facts, on which this question arises, are few; *William Lewer*, the testator, died indebted to the plaintiffs in a sum, which with the costs of recovering that sum amounted to 236 *l.* 10 *s.*; leaving *Watts* executor, and the widow of the testator executrix. Of this sum 114 *l.* 12 *s.* was due when the *feri facias* issued. Goods to the value of 200 *l.* came into the hands of the executrix, who intermarried with *Reid*. After the marriage, on the 28th May 1790, a writ of *feri facias* against the goods of *A. Reid* at the suit of *W. Wilson*, commanding the sheriff to levy 552 *l.* 14 *s.* 6 *d.*, was delivered to the defendants. On the same day, and after the delivering of that writ, a writ of *feri facias*, at the suit of the plaintiffs, was delivered to the defendants, commanding them to levy 114 *l.* 12 *s.* of the goods and chattels of *W. Lewer* deceased, at the time of his death in the hands of *Reid* and his wife to be administered, if there were so much, if not 32 *l.* costs of the goods of the husband and wife as executrix. Whether there were any goods of *Reid*, which had not been the goods of the testator does not appear: but it does appear that on the 28th of May 1790, when the first *feri facias* was delivered to the sheriffs, there were in the hands of *Reid* and his wife goods which had been the goods of the testator. It is not stated that those goods had been in any way appropriated by *Reid* or his wife, or that

knew the goods were the goods of the testator; but that will not make a fraud, as it is not stated that they knew the debts were unpaid. It is true that the executors might have disputed the seizing of the goods which he had as executor; but they did not object. On the contrary, by being a party to the bill of sale, they assented to it; and this bill of sale so assented to is equal to a purchase; and is the same as an alienation by the executors.

WILLES and ASHHURST, Justices, concurred.

BULLER, J. The case of *Gifford* and *Nugent* is not unapposite to the present. What is it that constitutes a *devastavit*? Not merely that they knew the goods so disposed of were assets, but that they also knew that there were debts unpaid.

Judgment for the Defendant.

either

either of them had paid debts of the testator, which they claimed to be reimbursed by the produce of these goods. If these goods were in law bound by the delivery to the defendants of the writ against the goods of *Reid*, the return is not false: but if they were not so bound, it was a false return.

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Before I consider the law, I will say a word upon the justice of the case. And I think no man can pause a moment upon it. Goods are delivered by the law into the hands of a man for the purpose of dividing them amongst the creditors, legatees, and next of kin, of another, whose goods they were. Their value we will suppose 1000*l*. The debts and legacies we will suppose 500*l*. On the day those goods are delivered to the executor, before the testator's creditors can recover their debts, a *fiери facias* for 2000*l*. against his goods is delivered to the sheriff. It is urged that these goods, the moment the writ is delivered, are bound to pay the debt of the executor, and that neither the creditors, nor legatees, nor next of kin, shall receive one farthing. The injustice is obvious. It is to make the goods of *A*. pay the debts of *B*; and possibly leaves the creditors of *A*. without any redress but against the person of *B*. One case of intolerable hardship may be put; suppose the executor indebted to the crown in more than the value of his own and the testator's personal estate: the moment the executor is invested with his authority an extent issues and sweeps away every shilling of the testator, in fraud of his creditors, legatees, and next of kin; a more shameful act of injustice can hardly exist under the name of law. I hope I can shew it to be no more law than it is justice. The ground on which it was, and must be, argued, is, that the *fiери facias* against the goods of the executor must be executed on the goods of the testator in the hands of the executor. And here I premise that (for argument sake) I shall consider *Reid*, the husband of the executrix, as if he were the executor. And it is argued that the moment a man becomes executor, the goods of the testator are so vested in him that they are liable to his debts as much and in the same way as his own proper goods are; in short that in the hands of the executor they are to be considered in all respects as his goods; at least as far as concerns executions against him. In order to see whether that position be well founded, I will consider what in law an executor is, and what interest he has in the testator's goods. One definition (and I think a good definition it is) that I find of an executor is, that he is one, to whom a testator has given his goods, chattels, and personal estate,

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for the purpose of paying all his debts. And in *Wentworth's Office of Executors* p. 4. it is said that "the naming of *A.* and *B.* executors is by implication a gift or donation unto them of all the goods and chattels credits and personal estate of the testator; and the laying upon them an obligation to pay all his debts and making them subject to every man's action for the same." And this, that is the payment of his debts, being the purpose for which the goods are given, his interest in the goods is not the same as in his own goods: the reason given is, that he hath them not in his own right but in the right of another; and that "by law he is but the minister and dispenser and distributor of these goods." 9 *Rep.* 88. b. *Wentw.* 88. That of this there can be no doubt we need but look into the entries of judgments against executors, and the writs of execution upon those judgments, which are to levy so much of the goods of the testator in his hands to be administered. This shews that the law considers those goods differently from his own goods; it is not to levy so much of *his goods*, which it would have been, if upon their coming into his hands, the law had considered them as his: but it is to levy *of the goods of the testator*, considering them, in his hands, still as the testator's. If they are not so to be considered, but as the goods of the executor, it seems that the writ of *fieri facias*, &c, *de bonis testatoris* cannot be executed: but inasmuch as they are in law the testator's, he (the executor) cannot devise them. If he die intestate, the goods of the testator vest, not in his administrator, but in the administrator *de bonis non* of the testator: if he commit felony, or treason, although he forfeit his own goods, yet those which he has as executor are not forfeited. For the law, and for the principle upon which the law is founded, I cannot do better than refer to *Wentworth's Office of Executors* p. 85, 86, 87, 88; and there we find (p. 86.) a passage directly applicable to the point now before us; "Whereas a man's goods stand liable to the payment of his debts, both in his life-time and after, the goods which a man hath as executor are not to be taken in execution for his own debts, either upon a recognizance, statute, or judgment, had against him. And if such an one die indebted, leaving to his executors much goods which he had as executor, these are not assets in his hands, liable to the payment of his debts, but only for the payment of the first testator's debts or legacies. Therefore a *quo minus* brought by an executor, shewing that he was not able to pay the king's debt, because the defendant detained from him 100*l.* which he owed him

him as executor to *F. S.* was overthrown; for that it could not be intended, saith the book, that the king's debt could be satisfied with that which the plaintiff should recover and receive as executor." And the reason of this difference is stated in *page 88*. The passage in *page 86* is direct, and what the author states to be law appears to be founded on passages in the Year Books, in *Plowden*, and in Lord *Coke*; and appears to have been adopted by Lord Chief Baron *Comyns* in his Digest, 1 vol. 259. (B. 10.) tit. "Administrator." His words are "Nor shall they be taken in execution for the proper debt of the executor or administrator." Upon the same principle we find in 3 *Burr.* 1369., that the commissioners of a bankrupt cannot seize the testator's goods in the hands of an executor bankrupt: but a commission of bankrupt is considered as a statutable execution; and if in law the goods are his goods, they vest in the commissioners and they are bound to take them. Such being the undoubted law as to some of the points I have taken notice of, one may fairly be permitted to ask, why may not the executor devise the testator's goods? Why may not his administrator take them? Why are they not forfeited to the crown on the attainder? Why are they not liable to be seized under a commission of bankrupt against the executor? The answer and reason is I think obvious. It is because they are not *his goods*; he is only the distributor and dispenser of them for the benefit of the creditors, the legatees, and the next of kin, of the testator. To permit him to devise them, to permit his administrator to take them, to permit the assignees under a commission against the executor to seize them, and to permit the sheriff under an execution issued against his goods, to take them, would be to dispose of them for purposes for which he had them not; in a way in which it cannot by law be intended that those purposes will be answered. And it seems very difficult to assign any reason why the goods of a testator in the hands of an executor should be privileged from a seizure by the crown in the case of an attainder of felony, and from a seizure by assignees under a commission, and yet not be privileged from being taken by the sheriff under a *fiery facias* against the executor's goods. On the part of the defendants it has been contended, that if in this case the goods are not considered as the goods of *Reid*, the husband of the executrix, the doctrine laid down in former cases, in which the executor has been considered as impowered to dispose of the goods of the testator, will be impeached; and it has been argued that this case is analogous to

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those cases. There I conceive is the fallacy; and that in the two cases there exists a manifest and material difference; and that the determination in this case for the plaintiffs will not at all impeach the law upon which that line of cases is founded. The power of selling or disposing of the goods of the testator the executor must have: it is necessarily incident to his office; without that power his trust cannot be executed; nor can the purposes for which it is given be answered. Therefore when he sells, the law intends that he sells the goods of the testator to answer the purposes for which the power of selling was given; and in so doing he does that which is necessary to his authority, and therefore lawful, just and right. But in the case before us it is the reverse; it is not necessary for the purpose of discharging the testator's debts, and executing the executor's authority, that the goods of the testator in the hands of the executor should be considered as the goods of the executor, and taken in execution under a judgment to recover a debt due from him. On the contrary, the moment they are taken under this judgment, the power of distributing them for the purposes for which they were given is taken away; and so far is it untrue, that it can be intended that thereby the testator's debts may be paid, that it is most evidently clear that, if suffered, it prevents the possibility of their being paid by the produce of those goods; and the power of distributing them in the way intended by the testator is taken away (and as it is said by law) and so, if it be true, a man is by law compelled to be unjust. For when they are taken in execution for the executor's debt, they are put into another channel; they are applied to a purpose for which they were not given; and the power of doing justice in this respect is taken from the executor, even if he intend to do it. Surely it cannot be the operation of law to work such absurdity and injustice under the plea of necessity, which clearly does not exist. But cases have been cited; and it was argued for the defendants that to this purpose is the case in 3 *Keb.* 839, *Hoyle v. Lundon*. That was a "motion to stay execution of goods in the sheriff's hands, being the wife's, as executrix to her former husband, and taken for the present husband's debt; which *Rainsford*, Ch. J. and *Jones*, J. denied, because by payment of the debts of the former husband these goods may be the wife's own; and this court will not try this *on affidavit*. And by *Rainsford*, Ch. J. in *Norden's* case, *supra* last term, it was held that execution against the goods of the executor for debt in *jure proprio* is a *devastavit nolens volens*."

volens." The observations upon this case are ; first, that whatever was determined was on a summary motion, and by the opinion of two judges only ; and 2dly, that the ground was that the goods *might* be the wife's own, by having paid debts of the former husband. Therefore it may be fairly inferred that, unless by something done by the executrix they become hers, they are to be considered as the goods of the testator. Here nothing appears to have been done ; and no fact is stated to shew that by the payment of a debt, or any thing else, they had become the wife's or her second husband's. But whether the wife's own or not the Court would not in that case determine on affidavit. This therefore they considered as a matter of fact. And here they are not stated to be hers ; nor any thing done by her to give her a claim to them. And then the Chief Justice alluded to a case which, in the report, is said to be "*supra* last term," but is not to be found ; and by which a man is guilty of a *devastavit nolens volens*. That the law will consider a man guilty of doing that which is unjust and unlawful as to third persons, and which the law says must be done, and that it is not in his power to prevent, seems most extraordinary, and appears to be the strongest of all reasons, for saying that that case, if even there were such an one, cannot be law. I have looked in the preceding term for such a case : there is none there ; nor is there in *Levinz* ; but in Sir T. Jones 88. there is reported, as of that term, a determination, of a case of *Norden v. Levet* (a) : but in *Levinz* and *Keble* the determination is stated as of *Trinity* term 29 Car. 2. That case was in error on a *scire facias* against an administrator, suggesting a *devastavit*. In that case, the administrator, having brought an action of trover in right of the intestate, compounded it by an agreement, that the administrator should discharge the defendant in the action of trover, and that the defendant should pay the administrator 650*l.* at a future day. The question was whether this was a *devastavit* ; and whether he should be liable upon this *de bonis propriis* ; it came on several times, and at last it was determined that this was a disposal and conversion to the use of the administrator ; and judgment was given for the plaintiff. From the name, the subject, and the time of the determination, I rather think this was the case alluded to by the Chief Justice, and certainly misapplied by him. The motion in the case cited was the first day of

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(a) See this case also in 3 *Keble* 778, | one before *Hoyl v. London*.
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Hilary term 1677; and only *Raynsford*, Ch. J. and *Jones*, J. were in court. The case of *Nugent v. Gifford*, 1 *Atk.* 463. proves only that an executor may assign over a mortgage term of his testator, and if he do so, although in payment of his own debt, such assignment is good: and that is founded on the doctrine that an executor may alien the assets of the testator, and when aliened no creditor can follow them; which I admit and say it does not apply to this case; for although he may alien, as the distributor of the goods, yet to every other purpose they are the goods of the testator, and so to be considered, and not his goods. The same observation and answer apply to *Jacomb v. Harwood*, 2 *Vez.* 265; and that case, as far as concerns this cause, proves only that where there are two executors, each may release, pay, transfer, or sell, without the other, any part of the testator's property; which I do not deny. In *Whale v. Booth*, Lord Mansfield said, "The general rule both of law and equity is now clear, that an executor may dispose of the assets; and they cannot be followed by the creditors of the testator. *Mead v. Ld. Orrery*, 2 *Vern.* 75. 2 *Eq. Cas. Abr.* 488. And it would be very inconvenient if the creditors could; for then no one would deal with an executor, without examining the whole account of assets. Where the buyer is any way accessory to the contrivance of a *devastavit*, that is a different case: but here it is not suggested; there is no appearance of fraud. The executor might have disputed the first execution, but he consented to it: and I do not see how it then differs from any other alienation. An execution acquiesced under is equivalent to a conveyance." Then the ground of that determination was that under all the circumstances of that case the execution was to be considered as a sale by the executor. If that were the ground, I have given it my answer, as not applicable to the present case; if it were upon the ground contended for in the present case, I say that this special verdict was made for the purpose of reconsidering that case; and reasonably too, when it is recollected that that ground is totally destructive of the purpose for which the power of the executor is given. But it is said, if this be not the law, no man can safely deal with an executor. That I deny; for a determination in this case for the plaintiffs will not decide that a man may not buy the testator's goods, if the executor chuse to sell them. It will only decide that a judgment against the executor's goods does not necessarily bind the goods of another person, who gave them to the executor to discharge

charge his (the testator's) debts and not the debts of the executor. And if it be said that the executor may with this money pay his own debts, and so elude the testator's intention, my answer is, I admit it: It is so, because (as I said before) the power of sale is necessarily incident to his office, and the law intends that he will do what is right: But in considering the goods of the testator as necessarily liable to the execution of a judgment against the executor, the law would compel injustice to be done, and consider the act as unjust, as it considers the execution which it compels, and which the executor cannot prevent, as a *devastavit* by him. A question may be put, How the sheriff is to distinguish between the goods of the executor and the goods of the testator? Here that question cannot be put; because the sheriffs were informed and had notice that these goods were the goods of the testator, and not the goods of the executor. But I will meet the objection in its full force. The sheriff in this, as in many other cases, must act at his peril: so say *Dalton* 146; and *Gilbert* in his Treatise on Execution, p. 21. *Dalton* 146, in inquiring into the duty of a sheriff, where there is a doubt respecting the property of the goods, says, "but the safest and wisest course for the sheriff or officer is to inquire by a jury in whom the property of the goods is; or else not to take in execution, or not to meddle at all with any such goods as shall not plainly appear to them to be the proper goods of the defendant; for it seemeth that the officer is bound at his peril to take knowledge whose the goods be, or at least that they be the proper goods of the defendant: but being found by the jury, that excuseth the sheriff." *Gilbert* 21. says, "the sheriff is bound at his peril to take only the goods of the defendant; and if he doubt whether the goods shewn him be the defendant's, he may summon a jury *de bene esse* to satisfy himself, whether the goods belong to the defendant or not. This will justify him in returning, that the defendant has no goods within his bailiwick, and mitigate damages in an action of trespass, if the goods seized should not happen to be the defendant's." If this would be a sufficient answer in the mouth of the sheriff, what are we to say to cases of a much severer line of justice; cases, where a sheriff is considered as a *tort-feasor* by relation; cases of bankruptcy. In the present case upon information given to the sheriff that the goods were the goods of the testator, unappropriated by the executor, and on which he had no demand, he might have summoned a jury; and had the jury found them to

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be the goods of the testator, not of the executor, he would have been justified in returning *nulla bona*. Upon these grounds it seems to me that the goods of the testator, upon the facts stated in this special verdict, were not in law the goods of the executor liable to an execution against him, but at the time when the *fi. fa.* against the goods of the testator was delivered to the sheriffs, continued and were the goods of the testator, liable to the execution against his goods; consequently that the execution delivered to the sheriffs against the goods of the executor did not bind the goods in his hands that remained unadministered; but when they received the writ to levy the debt of the goods of the testator, there were goods which they might have taken in execution of that writ.

In this way of considering the question there is no occasion for me to enter into a head of argument much discussed at the bar, how far these goods being vested in the executrix are in consequence of the marriage liable to be taken in execution for the debt of her husband; as in my opinion this action would have been maintainable, had the husband been the executor, and not merely the husband of an executrix. Nor do I consider the difference in point of law, whatever it may be in point of justice, that is made by the notice given to the sheriffs, that the goods were the testator's; because if my opinion be right, the sheriffs must at their peril execute the writ, and make a true return. In this case they have not so done, as they have returned *nulla bona* to the *fi. fa.* against the goods of the testator, when there were goods of the testator which they might have taken in execution of the writ. Therefore I am of opinion that, such return being false, the action is well supported, and that the plaintiffs ought to have judgment.

BULLER, J. This is an action against the sheriff for a false return to a *fi. fa.* The special verdict states that in *Easter* term 30 *Geo.* 3. the plaintiffs recovered against *Watts* and *Reid* and his wife, executors of *W. Lewer* 236*l.* 10*s.*; and on 17th *May* 30 *Geo.* 3. sued out a *fi. fa.* to levy that sum of the goods and chattels, which were of *Lewer* in the hands of the executors to be administered. That on 28th *May* 1790 the writ was delivered to the defendants, then sheriff. And that in *Easter* term 1790, *Wilson* recovered against *Reid* 1047*l.* debt, and 63*s.* damages and costs; which judgment was signed 27th *May* 1790. That on 28th *May* 1790 *Wilson* sued out a *fi. fa.* on that judgment,
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tested 17th *May*, which writ on 28th *May* 1790, and a few hours before the delivery of the plaintiffs' writ, was delivered to the sheriff, who under that writ, a few hours before the delivery of the plaintiffs' writ to him, seized goods in a house, wherein *Reid* and his wife resided, and in which house *Lewer* at his death did reside; and which goods were the goods of *Lewer*. That on the same 28th *May* 1790, after the sheriff had seized the said goods, the attorney for the plaintiff gave notice to the attorney for *Wilson*, and also to the sheriff, that the goods so seized were the goods of *Lewer* in the possession of *Reid* and his wife, as executors, liable to the payment of the debt recovered by the plaintiffs, and also liable to the payment of 116*l.* recovered by one *Stedman*, and not liable to the payment of any debt of *Reid*; the same not being sufficient to satisfy the said judgment and other debts of *Lewer*; and that the said attorney meant to take out executions on the said judgments; and unless they quitted possession, actions would be brought against them. That afterwards on the said 28th *May* the attorney for the plaintiffs procured a warrant from the defendants, then sheriff, on the writ of *fi. fa.* mentioned in the declaration, which warrant was on the same day delivered to the officer to be executed. That the officer went with the warrant to the house where the goods were before they were sold, but did not levy thereon; and the sheriffs afterwards returned *nulla bona* to that writ: and then the jury find that, by means of the premises, the plaintiffs are hindered from recovering their damages and have lost the same.

The general question referred by the jury to the Court is, whether the plaintiffs are entitled to recover? This special verdict seems to me to be very imperfect and incorrect; for when the plaintiffs' debt became due; when *Lewer* died; how long his executrix continued a widow; when she married *Reid*; how long he had been in possession of the goods; and what use he had made of them; the verdict is totally silent about. It may be true that the debt was of ten years standing; that the negligence of the plaintiffs was gross and outrageous, and calculated merely for the purpose of suffering the executrix and her (present) husband to enjoy and to use these goods as their own, without the danger of any other persons, who happened to be creditors, being troublesome on account of them. That there must have been a great negligence on the part of the plaintiffs is apparent; but for how long a time, or for what reasons that happened, the court are not informed. Since the plaintiffs' debt

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became due, the testator has died, one executor has died, and the other has married again: and though the notice of the 28th *May* only states that the plaintiffs intended to sue out execution, yet the verdict finds that they did sue out execution on the 17th *May*; and that they suffered that to lie dormant till the 28th of *May*, and till after *Wilson's* execution was executed. Why that was done we are not told. The question is whether upon this finding (such as it is) the plaintiffs are intitled to recover; and I am of opinion that they are not. When this case was before the Court in *Hil.* 1791, the Court sent it to a new trial for the purpose of inquiring whether there were any fraud between *Reid* and his creditor. That inquiry I conceive to be the true and only material one in the case. Upon this special verdict the jury have found no fraud; and therefore we are bound to say there was none. If the inquiry directed by the Court in *Hil.* 1791 were at all material, the circumstance of no fraud having been found by the jury would alone be sufficient to decide this case for the defendants. But I will suppose all that to be immaterial; and stating only that no fraud is found in this case between *Wilson* and *Reid*,

I will consider, 1st. The authorities and arguments which have been urged on the part of the plaintiffs; and 2dly, The authorities and reasons which occur to me on the part of the defendants.

For the plaintiffs several cases were quoted from the Court of Chancery, to which my answer is that none of them are of the least avail in a court of law; because the two courts act on different principles; and that which is the ground-work and foundation of the decision in courts of equity is directly repugnant to every rule and determination of the courts of law. Where a rule of property is settled in a court of equity, and there are no decisions against it at law, I am as ready as any man to follow the line of equity; for I think it absurd and injurious to the community that different rules should prevail in different courts on the same subject. But before we adopt the doctrines of courts of equity, we must see that we do not act in violation of settled rules of law, and that we have the power of following up the relief given by a court of equity to that extent, which makes their proceedings just and reasonable. The Court of Chancery consider the fund as debtor; and therefore they pursue that; collect it all into their own hands, under the notion of taking an account; call all persons before them, who have any demand on that fund; and distribute it amongst all, according

according to their priorities at law (if they have any) or if not, equally. But that Court has never said that, if the effects of a testator get *bonâ fide* and for a good consideration into the hands of a third person, they will take them from him. The case of *Elliot v. Merryman* (a) proves directly the contrary. This Court cannot call all the creditors together; they cannot compel an account of all the effects, or administer the same relief which equity does; therefore we must not be governed by the rules of equity on this subject. At law there is no such thing as a *fund* in the hands of an executor being the *debtor*; but the *person of the executor, in respect of the assets which he has in his hands, is the debtor*. If he admit (or which is the same thing do not deny) assets, the judgment and execution are to levy the debt out of the assets in his hands, because he is sued as executor, and is liable in respect of them. But he is not permitted to say "you have recovered against the assets, and therefore you must find them, or go unpaid." On the contrary, if he do not produce them, or they cannot be found, he (the executor) immediately becomes *personally* liable in an action of debt, suggesting a *devastavit*: and it is no answer for him to say "then, here are the testator's goods; take them, and let me go." *Rock v. Leighton* (b). The authorities at law quoted at the bar in behalf of the plaintiffs are very scanty indeed; but such as are at all applicable to the case ought to be considered. Those are 1 *Com. Dig.* 259; and *Plowd.* 525; and they were cited to prove that the goods of a testator shall not be taken in execution for the debt of the executor. If this be true to the extent which the words import, it decides the question. But the contrary has been adjudged, as I will shew presently. *Comyns* quotes no authority for this position: but on the contrary there are several passages in the same page, which say that the property vests in the executor, and that even before actual possession. I think it very probable that Lord C. B. *Comyns* had in his mind a reference to the case in *Plowden*, when he wrote that; but *Plowd.* warrants no such thing. He says, in the page cited, if the executor die, the testator's goods shall not be taken for the executor's debt. And afterwards it is said, goods which were the first testator's shall not be put in execution for the debt of the *last* testator; for the last executors have them as the immediate executors of the first testator. But that is not

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(a) 2 *Eq. Cas. Abr.* 450. c. 6. *Ib.* 686.
c. 12; and 2 *Atk.* 41.

(b) *Vide ante* 3 vol. 690.

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this case; nor at all like it. Upon the second argument it was thought to be material to ascertain in whom the property was; and it was contended that these goods never were the property of any person but of the testator in the hands of his executors to be administered. But *Comyns*, on whom they rely, decides this point against them: for he says they are *the property* of the executors; and to say that a man has a property in goods after he is dead, or that because they were once the property of a man who is dead, they are now the property of no one, are propositions which cannot possibly be maintained. On the contrary, it is settled by many of the cases quoted at the bar that the property is vested in the executrix, and that she or her husband may grant, alien, give, or release, them. If an executor grant all his goods and chattels, not only his own, but also what he has as executor, shall pass. 2 *Roll. Abr.* 58. pl. 8. 1 *Leon.* 263. and *Shep. Touch.* 94. So if he have some cause of action for himself, and some for his testator, and he release all actions indefinitely, this release doth discharge both sorts of actions. *Shep. Touch.* 339. If any tenderness had prevailed, or alarm been taken, about making the executor guilty of a *devastavit*, all these cases should have been determined the other way. But the law goes on more general, and on broader, principles. It says the property is the executor's; and whatever is his property may be taken for his debt. If he owe one debt on his own account, and another on account of the testator, (provided he ever had assets sufficient) he is liable for both: if he can pay only one, he must go to gaol for the other; and it is indifferent to him for which debt he does go to gaol. If ever he had assets sufficient, it is perfectly immaterial whether he has them now, or what is become of them. And as to the creditor of the testator, when the property gets into other hands, he must use due diligence, or abide by the loss. If the executor be not insolvent, he will still recover his debt; and if he be insolvent, still the creditor may have the highest execution which the law knows, and that is against the body. Whether the husband of the executrix in this case be insolvent or not no where appears; and if he be not, the plaintiffs are disputing *de lana caprina*. The case, most analagous to that of executors, is the case of *Baron and Feme*, where the wife has a term of years vested in her before marriage. By the marriage the husband acquires a right to dispose of that term; but unless he do some act to dispose of it, upon his death it will survive to the wife. If he

dispose of it partially only, the remainder will belong to her. But yet such a term may be taken in execution for the husband's debt; and it does not depend on his assent or dissent whether it may be taken or not. But *nolens volens* the creditor of the husband has a right to be satisfied out of it. There an execution is equivalent to a grant or conveyance by the husband; and *pari ratione*, I think the execution in this case is equivalent to a sale; which (on all hands it is admitted) would be good. The plaintiffs should have followed the advice of *Dodderidge, J.* in *Touch. (a)* who says "It is policy for a creditor who hath cause to sue an executor to be doing betimes, and to get judgment and execution as soon as he may; for it falleth out in this case that he who doth first come shall be first served." If goods be taken out of the hands of an executor, he must bring trespass, as for his own goods. But the great stress of the argument on the part of the plaintiffs is that notice was given to the sheriffs that these goods were the property of the testator, and that the plaintiffs were creditors of his, and intended to sue out execution. This argument stands destitute of all authority whatever. But I will not pass it over, without considering what could or could not be the effect of notice in such a case. The defendants were sheriff; and they had seized the goods in question for a debt of *Reid's*; those goods then being in his possession, and he then using them as his own. If the sheriff acted legally in seizing the goods, he was bound to proceed in the execution; and a subsequent notice would not make that unlawful, which was lawful at the time. If the seizure were unlawful, the sheriff was liable to an action, without any notice; and if it were not unlawful, no notice could make it so. A notice in such a case as this is a perfect novelty, unknown to the common law with regard to any effect which it could have. But it must not be forgotten that we are now in the case of the sheriff; and therefore we must examine what he could do to protect or indemnify himself. Suppose the contents of the notice were all false; how was the sheriff to try whether they were true or false. But they may be all true, and yet the sheriff not be protected in abandoning the execution. For suppose the plaintiffs' debt were of ten years standing, and a plan formed between the plaintiffs and the executrix that she should enjoy the goods for her own use, and that the plaintiffs would not molest her, unless the goods were seized by some other person. Or suppose the executrix

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had paid debts to the amount of all the effects, or only to the amount of these goods; in such case the property would clearly have become absolutely and intirely her own. For *Plowd.* 186. says "if an executor pay the testator's debts with his own money, he may retain to the value out of the testator's goods, as his own proper goods." How is the sheriff to try any one of these questions? It should be enough for him that the goods are in the possession of the debtor, and used by him as his own. When the plaintiffs' execution came to the sheriffs' hands they could not take these goods under it. The writ commanded the sheriffs to levy the debt *of the goods and chattels of the testator in the hands of Reid and his wife* to be administered. These goods were not then in their hands, but they were in the hands of the sheriff, and in *custodiâ legis*. And in *Holt.* 643, and 1 *Show.* 174. it was resolved by *Holt*, Ch. J. that goods being once seized and in custody of the law, they could not be seized again by the same or any other sheriffs. The same point is said to have been resolved by him in court the day before, in his argument between *Etkins* and *Western*, and not denied by any of the judges. So the sheriff cannot take goods, which have been distrained. *Tully and Another v. Peachey*, *Hil.* 23 *Geo.* 3. In my opinion it is highly inconvenient to the Public that goods should ever be so fettered or limited as not to be liable to the debts of those, who have the enjoyment, and are suffered to appear as the real owners, of them. Some cases have gone a great way on that subject; and, as far as they have gone, perhaps we may be bound by them. For the same reason I think we ought to be bound by other cases, which I shall mention presently; more especially as they seem to be founded on good and plain principles of law and convenience too. I see no inconvenience in saying that any man, who will trust goods to another on his personal credit, to use as his own, shall have no remedy in case the goods are seized but against the person to whom he has so given credit, and whom by those means he may have enabled to draw in unwary tradesmen. A contrary doctrine would introduce great uncertainty and inconvenience. It would embarrass honest creditors, and no man would be safe in levying his debt under an execution, provided his debtor were clothed with the character of an executor to another. For if he should take one article out of an hundred, which was once the property of the testator, he must submit to be ruined by an action; and that is to be done without the possible means

means of his knowing whether there were any, and what, debts of the testator's unpaid; or whether the goods seized were originally the property of the testator, or executor. For he, having no demand on the testator's effects, cannot even in equity call for an account of the testator's debts and effects: Nay even if he could do so, his situation would not be bettered; for that would only be giving seasonable notice to his debtor to dispose of his property, and put himself beyond his creditor's reach. But independently of all arguments *ab inconvenienti*, I think this point has already been decided; and that we are bound by the decisions of *Hoyle v. Lundon*, 3 Keb. 839. and *Whale v. Booth*, M. 25 Geo. 3. In *Hoyle v. Lundon* the motion was to stay the execution of goods in the sheriff's hands, being the wife's, as executrix to her former husband, and taken for the present husband's debt; which was denied, because, by payment of the debts of the former husband, these goods may be the wife's own, and this Court will not try this on affidavit. And by the Chief Justice "in *Norden's* case, last term, it was held that execution against the goods of the executor for debt in *jure proprio* is a *devastavit nolens volens*." It is stated as clear law, and will not now be denied, that by payment of the husband's debts the goods become the property of the executrix. This is not at all qualified by the manner in which the motion came before the Court. But the most decisive part is what is stated by the Chief Justice to have been done in *Norden's* case. It is impossible to suppose that the Chief Justice did not know what he himself had done in the last term; and the book is express that an execution against the goods of an executor for his own debt is a *devastavit nolens volens*. If it be so *nolens volens*, there is an end of all question about the acquiescence or assent of the executor, for he has not the power of assenting or dissenting; and let him dissent as much as he will, yet the execution is good. This is necessarily implied in the terms *nolens volens*. What was said by Lord Mansfield in the case of *Whale v. Booth*, which has been much relied on by the counsel for the plaintiffs, about acquiescence and consent was not necessary in the case; for nothing was said in the case about assent or dissent; the executor was no party to the cause; and it was perfectly immaterial there whether the executor could or could not have avoided the execution. His Lordship said the general rule of law and equity was clearly settled, that an executor may dispose of the assets of the testator, *and the creditor cannot follow them*. If the law were

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otherwise, nobody could deal with an executor without taking an account of the whole estate. It is likewise clear that when he aliens, the *purchaser must know they are assets*, and yet that is no objection. He may alien for a debt of his own. Then his Lordship excepted the case of fraud or contrivance to enable an executor to commit a *devastavit*. This case (says he) comes within *the principle*, that is, the principle before mentioned; and a sale under an execution is equivalent to a sale by the executor himself. If (says his Lordship) an executor has paid all the debts, the effects are his own; and a stranger or third person cannot tell whether he has or not. From hence it necessarily follows that in the case of a stranger it is immaterial whether they be paid or not. Then follow the words which have been so much commented upon, namely, "when the goods were taken the executor might have disputed it, and said they were the goods of the testator; but he did not. He consents to it." But his Lordship concludes "*It cannot be distinguished from an alienation by the executor.*" I have already stated that what was said in that case about consent was not necessary in the cause; and I cannot conceive how the executor, of all people in the world, should be permitted to dispute the execution. He is indebted to two persons; he keeps and uses the goods, and pays neither. If either of them seize the goods, I should think he could not object to it; and indeed the case of *Hoyle v. Landon* fully proves that proposition. At law, he who first comes must be first served; and if the goods of a testator be taken for the proper debt of the executor, the executor will become personally liable to the creditor of the testator. And as to the creditor who seizes the goods, *though he know they were part of the assets*, yet according to what Lord Mansfield said in *Whale v. Booth* it is no objection; for there can be no difference between a purchaser and a creditor under an execution. If it be no objection against the creditor, *à fortiori* it cannot be against the sheriff. But (for argument sake) I will suppose that the executor might have disputed the execution, yet that will not avail the plaintiffs in this cause; for they are not executors; the executor has not disputed the execution, or taken any part in the business; and if his consent were necessary, I say his not objecting is assenting. In this case, as in *Whale v. Booth*, the plaintiffs are creditors of the testator's, and the defendants are sheriff; and therefore that case is a direct authority in point for the present. The only difference between them is that in the present case there was notice;

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but that cannot alter the law, except in cases where the law itself requires notice: and besides the notice was not by the executor but by the attorney for the plaintiffs, the creditors. Again, even supposing that there may be cases, the existence of which I deny, in which a creditor of an executor cannot seize the goods of the testator, yet there is still another case upon the authority of which the plaintiffs ought not to have judgment on the facts found by this special verdict. For in *Aylesbury* against *Harvey*, 3 *Lev.* 204. a replevin was brought for a silver cup, and the defendant justified by a condemnation before the justices of peace upon the statute of excise for the non-entry of strong waters, and a warrant made to levy a fine of 20s. set on the plaintiff for it. The plaintiff replied that J. S. made him executor in 1666, and he had this cup, *and yet has it as executor*. Several objections were made at the bar; but the point that the testator's goods could not be seized for the debt of the executor was not thought even to be arguable. But at the end of the case it is said the Court did not regard the plea that he had it as executor so long ago, but they would intend the property altered, notwithstanding the *adhuc habet*; for it would be very perilous to all officers, if such pleading were allowed. The question whether the goods of a testator may in all cases be seized for the debt of the executor was not agitated there; but if it had been, the argument of its being very perilous to all officers would have applied as powerfully as it did to the particular case. The point adjudged was, that in the case then before the court (however the law in general might stand) the goods of the testator might be taken for the debt of the executor; and if time be material in the decision of this question, and it be clear that in some cases they may be so taken, then it was incumbent on the plaintiffs before they could do away the former execution, and charge the sheriff, to shew that they came within due time; but that they have not done. The case in *Lev.* is a direct authority against the general position in *Comyns*; and there is no case whatever, which says that a creditor under any circumstances may maintain such an action as the present. This does not appear upon the record to be a case in which the executrix herself could object to the first execution, if she had been willing and able so to do. But even if she could, still it remains to be proved that a creditor may make that objection; for which no authority has been quoted. It also seems to me that before judgment can be given for the plaintiffs, the Court must

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must be prepared to say that though the executrix may have paid more in discharge of the testator's debts than ever came to her hands, and though sufficient assets may remain to satisfy the plaintiffs' debt, yet that the creditor of the husband could not seize any goods which ever had been the testator's. For it is not found by this record what were the value of the assets, or the amount of the debts, or what the executrix has paid, or whether there are or are not assets remaining sufficient to satisfy this debt. The jury have said that the sheriff seized goods in the house wherein the executrix of her husband lived, and in which house the testator lived at his death, and which goods were once the goods of the testator, and were then in the hands of the executrix and her husband: but they have omitted the common words, that the goods were *in their hands to be administered*. Whether the goods had been sold at an auction, and the executrix bought them in, and applied the produce in payment of debts, or in what right she had them at the time of the execution, the Court is wholly uninformed; and therefore this case is infinitely looser than the case in 3 Lev. 204. where the words "that the defendant yet has it as executor" were holden insufficient. The sheriff, it is true, has returned *that there are no assets in his bailiwick*, whereof he could levy the damages; but that will not supply the defect of the verdict; neither will the repetition of the inference and conclusion drawn by the close of the declaration "that by means of the premises the plaintiffs have been greatly retarded and hindered from obtaining their damages and lost the same" serve the purpose; for that is an inference without a fact to support it. In every light in which I have been able to put this case, I am of opinion that there ought to be judgment for the defendants.

ASHHURST, J. I do not mean to controvert the general doctrine, that by the appointment of a person, as executor, the legal property in the personal estate of the testator does on his death vest in such person, as executor. Nor do I mean to controvert that he has, as necessarily incident to the nature of his office, a disposing power over such property; for it being a part of his office to pay debts &c, he must be able to convert the specific property into money by the sale of it. If it were otherwise, no man would deal with an executor; for the buyer cannot be supposed to have a knowledge of the state of the testator's property and debts; and therefore the bare act of sale is a sufficient indemnity to the purchaser, if there be no collusion.

I will add that I do not disagree with the doctrine laid down in the case of *Whale v. Booth*: but in my opinion that case does not at all govern the present; for in that the execution (for the proper debt of the executors) was completely executed, and a bill of sale made before the coming in of the plaintiffs' execution for a debt of the testator's; and though it is stated that the creditor knew the goods seized were part of the testator's property, it is not stated that he knew there were unsatisfied debts, nor did any creditor intervene till the execution was completely executed, (which is not the case here). If the creditors will lie by, and not assert their rights, it is reasonable for a third person to suppose that all the debts are satisfied; and if so, the executors have the property; or they may have paid the debts with their own money, and it would be very inconvenient that an execution completely executed should be overhauled, when it was owing to the laches and neglect of the party that the prior execution was suffered to be completed. There are cases where even the crown may lose its priority by not asserting its claim in due time; as in *The King v. Cotton* (a); where it seems taken for granted that in case of distress and sale a crown process tested *after the sale* shall not overhaul it, though for a prior debt. I shall next consider what the nature of the property is, which an executor has in the assets of the testator. And I apprehend it clearly not to be an *absolute*, but a *qualified*, property; he has it only under a trust to apply it for payment of the testator's debts, and such other purposes as he ought to fulfil in the course of his office, as executor. This appears plainly from the form of the judgment in an action brought by a creditor of the testator; for it is "to be levied of the goods of the testator in the hands of the executors to be administered, if they have so much in their hands, and if they have not, then the costs to be levied of the proper goods of the executors:" this shews plainly that the law makes a distinction between the goods he has as executor, and those he has in his own right. But it may be said that, as the executor has the legal property in these goods, and the sheriff has an execution against *his* goods, the sheriff is bound to take them if he can find no other. In answer to this, I say that, as between the sheriff and the party, the sheriff will certainly not be a *trespasser* by the taking; but, as between the sheriff and an unsatisfied creditor of the testator, he is guilty of a wrong, if he proceed to sell after notice from such creditor that the goods seized were

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the property of the testator, and that he has a judgment against the executor to be levied of the testator's goods: and he would be justified, as against the creditor of the executor, if he were to return *nulla bona*; for though the executor has the legal property, they are not his *simpliciter*, but merely as a trustee for certain purposes till all debts are paid. But the case in 3 *Keb.* 839. has been cited at the bar, and relied on. In the first place, this book does not stand in the highest degree of authority in general; and I do not think the intrinsic merit of the report itself of this case will add much to its authority. That case has been already mentioned, and therefore it is not necessary to state it again. But I must observe that *Norden's* case, which is there referred to as of the preceding term, is not to be found. But to give the principal case more credit than it seems to deserve, let us consider what it is. The Court denied the motion "because by payment of the debts of the former husband, these goods may be the wife's own; and this Court will not try this upon affidavit." The Court then refused to enter into this in a summary way. But that objection does not hold in the present case, where the Court are proceeding upon a special verdict, and where all the facts appear before them on record. There too the Court said "the goods may be the executor's own by payment of the debts of the testator." But there is nothing before us, upon which we can ground such a presumption. In the first place the executor has not pretended upon the record that he has fully administered; and we are not then to presume it. Nor has the sheriff given any evidence upon this trial that the executor has paid debts to the amount. And I have always taken it as a rule that nothing is to be intended upon a special verdict. Let us next consider what is the justice of the case. The creditor who has brought his action, and recovered judgment against the husband of the executrix in his own right, has given credit to the party himself. The testator's creditor never gave any credit but to the testator, and his assets. If then one of the two is to suffer, it must be agreed that he ought to suffer who has given credit to the executor. But it has been said this will be a *devastavit* in the executor, and the plaintiff may have a remedy against him on the *devastavit, de bonis propriis*; but unfortunately it appears on the record that the executor has no goods and chattels of his own; therefore the plaintiffs' right to bring such action will be but a poor remedy. They never trusted to the executor's solvency, but trusted to the testator and his assets. I cannot

agree that, because the sheriff has seized, he is bound to sell. Suppose he had seized goods, as the goods of the debtor, when it afterwards appeared before sale that they were manifestly the goods of another; it could not be contended that he was bound to sell. Or suppose the party had the goods *as a trustee* for certain purposes, which was made known to the sheriff before sale, if the sheriff persisted in selling, it would in my opinion be a tortious act in him. Therefore I am of opinion that judgment must be given for the plaintiffs.

Lord KENYON, Ch. J. I am very glad that this question has been brought before the Court on a special verdict, because if the counsel for the defendants have any serious doubts about the legality of our judgment, they will have an opportunity of questioning it by bringing a writ of error. A more momentous question never came before the Court; inasmuch as it may respect the property of every man in the kingdom; for persons in general, who have property to dispose of, are usually circum-spect enough to make their wills, and to make a selection of persons to be their executors, in whom they can confide: and as it is impossible to scrutinize the heart of man, or to foresee what change of circumstances may befall their executors, no prudence, according to the defendants' argument, could insure any honest man that his debts should be paid, even though he left an ample fund for that purpose. About the justice of this case no man living can doubt. *A.* died indebted to a considerable amount, leaving assets, and appointing executors to administer them; and part of these assets remained in the hands of the husband of the executrix down to the time when an execution was issued for the proper debt of the executrix's husband. When that writ came to the sheriff, if no claim had been made by any other person, if there had been no evidence to induce the sheriff to believe that the goods seized were the property of the testator unadministered, if there had been no competition between the respective creditors who had the superior claim, the goods taken must have been considered as the property of him, in whose hands they were found. They would have been treated as his own originally, or as having become so by payment of all the debts of the testator. But it is now too late to say that, in every case, and under all circumstances, the possession of goods is conclusive evidence of property, and will warrant a sheriff in seizing *all* goods in the hands of the executor. In deciding that, we should forget a series of decided cases upon marriage settle-ments,

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ments, *Cadogan v. Kennet* (a); and many others. They establish this point, that as soon as it becomes necessary to justice to enquire to whom the goods belong, the sheriff is bound to make that enquiry. But it was said, in the argument, that it was difficult for the sheriff to decide in this case to whom these goods belonged: it was not less difficult in all those cases alluded to; because possession is *prima facie* evidence of property. But the sheriff is bound to execute the duties of his office; and if any question arise about the property, the passage cited by my brother *Grose* from *Dalton* shews that he has an opportunity of deciding that by summoning a jury; and that will at all events justify him. That, in general, there is a distinction between those goods which an executor has in his own right, and those which he has as executor, the very form of proceedings abundantly evinces. For in an action against an executor the judgment is that the debt shall be levied *de bonis testatoris*, if there be sufficient goods of the testator in the hands of the executor to be administered, and the damages and costs in certain events to be levied *de bonis propriis*. In executing such a writ the sheriff must abide by the terms of the writ, and make a distinction between the two sorts of goods. And if, in the execution of such a writ, he cannot find goods sufficient to answer the debt of the testator's creditor, he cannot have recourse to the other fund; but the creditor must institute a new action, alleging a *devastavit*, before he can resort to that other fund, and have execution against the executor's goods. This shews the distinction between the two funds beyond all doubt, and is of greater authority than even adjudged cases, because the writs and records form the law of the land. I will not go through all the cases upon the subject, because my brother *Grose* has already stated them: but they all prove that wherever it is necessary to enquire whether goods in the hands of the executor belong to him, or to the testator, the sheriff is bound to institute the enquiry. In 3 *Burr.* 1369, Lord *Mansfield* expressly said "If an executor become a bankrupt, the commissioners cannot seize the specific effects of his testator; not even in money, which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself." This indeed did not want the authority of Lord *Mansfield*; for it stands upon the first principle of law and justice, *jus suum cuique tribuere*. One of the cases

(a. *Cow.* .4;2.

cited

cited was from 1 *Rol. Abr.* 889 (a). where it is said, "if the husband of an executrix sue with her for a debt due to her as executrix to J. S., and the wife die after judgment and before execution, the husband cannot have execution on the judgment; for though he was privy to the judgment, yet he shall not recover the debt, because that would belong to the succeeding executor or administrator of J. S." Now if all the property which an executor had, whether belonging to the testator or to himself, were to be mixed in one undistinguished mass, such cases never could have arisen. In that case if the husband and wife had sued for a debt due to the wife in her own right, the husband might have had execution. As to the case cited from 3 *Keble*; my brother *Ashburst* has already observed that that reporter is not always accurate; and, if any instance were wanting to warrant the observation, the case referred to would prove it; because he there referred to another case of his own reporting, as of the preceding term, which is not there to be found. And indeed I cannot reconcile to my mind the principle said to have been established in *Norden's* case, that an executor shall be compelled to commit a *devastavit nolens volens*. But the principal case might, I think, have been cited by the plaintiffs here; there the Court "refused on motion to stay execution of goods in the sheriff's hand, being the wife's, as executrix to her former husband, and taken for the present husband's debt, *because by payment of the debts of the former husband, the goods might be the wife's own*; and the Court would not try this on affidavit." There the material question was, whether or not the wife had paid debts to the amount of those goods; because, if she had, they would have belonged to her: but that the Court refused to try on a summary application. But it is not said in that case that a creditor of the testator came in before the execution was executed: but the goods being found in the possession of the husband of the executrix, and no competitor appearing to make any cross demand, they were (for any thing that appeared to the contrary) his own, and were therefore taken in execution for his debt. But that case does not prove that if there had been any competition between the creditor of the executor and of the testator, and if the fair state of the case had been disclosed to the sheriff, he must have taken the goods as belonging to the former. As little to the defendants' purpose also is the case of *Whale v. Booth*. Lord *Mansfield*, in deciding that case, attended

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(a) 889. tit. "Execution;" there being two pages of the same number.

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to the justice of it, and seemed rejoiced to find that the law and the justice of the case were not at variance. His lordship began with saying "that the general rule of law and equity was clearly settled, that an executor *may* alien the assets of the testator for a debt of his own, and that a creditor cannot follow them; and that it is no objection to the validity of the sale that the purchaser knew that they were assets." It is absolutely necessary that he should have that power, in order to convert the goods into money for the payment of debts. His lordship stated one exception, "Where there was a contrivance between the executor and his creditor to enable the former to commit a *devastavit*." Here indeed was no contrivance between those persons: but the effect was the same; for the attempt on the part of the creditor was to compel the executor to commit a *devastavit*, which is an exception to the general rule. Lord *Mansfield* then proceeded to say that "when the executor had paid all the demands upon the testator, the assets belonged to him." But that cannot apply to this case; where, so far from the testator's debts being all paid, it appears that before the execution against the executor was executed, this competition between the respective creditors arose, which shews that the testator's effects were not become the property of the executor, because the debts were not paid. His lordship then said "when the effects were seized, the executor might have disputed their being applied to satisfy his own debt." It is true that the executor may dispute it; and when the objection is made, it controls the *prima facie* evidence that the goods in the hands of the executor are his own. His lordship also added that "the sale under the execution in that case could not be distinguished from an alienation by an executor." In general it cannot; but it may be distinguished when the seizure is made to answer the purposes of injustice. I agree therefore with the reasoning of that case throughout; and think that that case and the one in *Keble* afford a strong argument in favor of the plaintiffs here. I am not prepared to exclude from our consideration the decisions in courts of equity. *Equitas sequitur legem*. Where the law is ineffectual, equity steps in to give redress, following however the rules of law. And in *Cowper v. Lord Cowper* (a) Sir *Joseph Jekyll*, in commenting on the jurisdiction of the Lord Chancellor, said that the discretion which was to be exercised in

(a) 1 P. Wms. 753.

that Court was to be governed by the rules of law and equity ; that in some cases it followed and assisted the law, by advancing the remedy ; and that though in others it relieved against the abuse, or allayed the rigors, of it, it in no case contradicted or overturned the grounds or principles of law. With regard to the case cited from 3 *Lev.* 204. where the silver cup was taken in the hands of the executor ; the ground upon which the Court proceeded was that they would intend the property altered after so long a possession by the executor. But there is no ground here upon which we can intend an alteration in this property : but, on the contrary, that intendment is negatived, for it appears that the executor has not paid all the debts of the testator. The facts found by this verdict, instead of opening a door to let in the presumption that the testator's debts were paid, and that the goods were consequently become the property of the executor, absolutely exclude it. As to the expression cited from *Showers* to shew that goods once seized cannot be seized again, it must mean, when they are *legally seized* ; for if any thing happen to disaffirm the first seizure, and to shew that it was not legal, it is considered as no seizure in law ; and the word " seizure " is in such a case misapplied.

I desire to be understood as not wishing in the least to abridge the powers of executors, or to shake the authority of a single determination, but leaving executors in the full possession of all the powers with which they were ever invested, I would say " let them execute their duty, and let their authority cease where injustice begins."

Per Curiam,

Judgment for the Plaintiffs.

DUBERLEY *against* GUNNING.

Tuesday,
May 8th.

THIS action for criminal conversation was tried before Lord *Kenyon* at the Sittings for *Westminster* after last term ; when the defendant, in answer to the case proved on the part of the plaintiff, gave evidence of many indecent familiarities between him, (the defendant,) and the plaintiff's wife in the presence of her husband, from whence the jury were pressed to draw the inference of connivance on his part.

LORD KENYON, in summing up the evidence, told the jury that, if they were of opinion that the husband had consented to the infidelity of his wife, it took away altogether the ground of the action, and they should find a verdict for the defendant.

The Court will not grant a new trial in an action for criminal conversation, merely because the damages appear to them to be excessive.

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If they thought that, though he had not gone that length, yet he had been guilty of gross negligence or inattention to her conduct with respect to the defendant, that would go far in mitigation of the damages; and to this opinion he himself most strongly inclined. But if they saw no ground for imputing even such negligence to the plaintiff, then they were to assess what damages under all the circumstances he was entitled to. The jury found a verdict for the plaintiff with 5,000 *l.* damages.

A rule was obtained to shew cause why the verdict should not be set aside, and a new trial had on two grounds; 1st, as a verdict altogether against evidence; 2dly, on the ground of excessive damages. It is unnecessary to enter into the detail and examination of the particular evidence given in the cause. On the first ground *Buller, J.* alone was of opinion that the verdict was wrong; the other three judges thought that the jury had, at all events, done right in finding a verdict for the plaintiff. As to the second point,

Erskine, Wood, and Shepherd, shewed cause; contending, that in a case of this kind the question of damages was so exclusively within the province of the jury, depending upon a variety of considerations, many of them springing from the feelings of human nature, that the Court could not interfere to correct their opinion, without taking upon them the characters of jurors as well as judges. In all other cases where the Courts have granted new trials on the ground of excessive damages, there are certain *criteria* by which the propriety of the damages given may be estimated; and though possibly no exact line can be drawn, yet it may easily be seen whether the damages given be greatly disproportionate to the injury received, and its actual or probable consequences. But in a case like the present where the spirit is principally wounded, and the future happiness of the sufferer destroyed, there is no standard by which the judges can ascertain the excess of the damages given; for, admitting that the judges, had they been substituted in the place of the jury, would have given less, it does not follow that they would have decided more properly than the jury have done; nor would it be capable of ascertainment by reference to any known rule whether they had or not. But in this case the constitution has relied upon the judgment of the jury, and not of the Court; and therefore it may fairly be presumed that it was thought the best tribunal to which such a question could be referred. And the Judges themselves have heretofore conceded this point to the

the exclusive examination of the jury; for in *Wilford v. Berkeley* (a), upon a motion like the present, on the same ground of excess of damages, "The Court were clear and unanimous, that, although there was no doubt of the power of the Court to exercise a proper discretion in setting aside verdicts for excessive damages in cases where the *quantum* of the damage really suffered by the plaintiff could be apparent, or they were of such a nature that the Court could properly judge of the degree of the injury, and could see manifestly that the jury had been outrageous in giving such damages as greatly exceeded the injury; yet the case was very different where it depended upon circumstances, which were properly and solely under the cognizance of the jury, and were fit to be submitted to their decision and estimate. And they held the case of criminal conversation with another man's wife to be of this *latter* kind. For the injury suffered by the husband, and the estimate of the damages to be assessed, must in their nature depend entirely upon circumstances, which it was strictly and properly the province of the jury to judge of." The case of *Chem v. Brigg*, *Mic. 6 Geo. 1. B. R.* was also cited, as exactly similar in principle to the above determination. In *Ducker v. Wood* (b), where a new trial was moved for on the ground of excessive damages in an action for an assault, the verdict being for 150 *l.*, the Court refused it. So they did in *Redshaw v. Brook and Others* (c), where 200 *l.* damages were given against custom-house officers for entering a house to search for uncustomed goods; although it was stated that little or no damage was done, and the officers behaved well enough; and the Court thought the damages might be too large; yet they said, they could not draw the line to fix the measure of damages. And the Court held the same language in a similar case of *Bruce v. Rawlins and Others* (d). If the Court could interfere here, because they conceive the damages to be too great, they may on the same principle grant a new trial where they think the damages are too small; but that was never contended for.

Bearcroft, Mingay, Bower, and Baldwin, contra, admitted that in a case like the present it was necessary for the party complaining of the excess of damages to make out a very strong case for relief. But if such a case were made out, as they contended it was here, if the verdict were admitted to be unjust, and the

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(a) 1 *Burr.* 609.(b) *Ante* 1 vol. 277.(c) 2 *Wilf.* 405.(d) 3 *Wilf.* 61.

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damages enormously disproportionate to the injury proved, it would be the strongest reflection upon the laws, and a stigma upon the trial by jury itself, to say that no redress could be afforded. The case cited from *Burrow* goes no further than to shew that the Court could not say that 500*l.* was too much in *that* case. So here if the Court cannot see clearly that 5,000*l.* is too much, the defendant cannot expect a new trial. The only objection which has been urged on principle to the Court's interfering in such a case as this is that there is no certain standard by which they are enabled to try the excess of damages. That indeed may be a reason for disputing the supposed excess, on account of the difficulty of proving it in any particular case: but, admitting the excess, if such an argument could prevail here, it might be urged with as much justice against the granting of new trials for excess of damages in cases of slander and many others, where the power of the Court to interfere was never doubted. The *difficulty* therefore of exercising the judgment upon such a question is no argument against the *power* of exercising it. The ground on which courts of law interfere in all cases of granting new trials is to prevent injustice, whether it arise from accident or error; or whether the error be in the judge, or the jury. And if the injustice of a verdict be once established, the exercise of this right is not merely a matter of discretion, but of duty.

Lord KENYON, Ch. J. It has been pressed upon the Court that, this question of damages being within the sole province of the jury to determine, an application for a new trial on the ground of excess is an appeal from the proper jurisdiction to another which has no cognizance of such a question. But in general cases the opinions of juries have been revised in some shape or another from all times. The ancient method of correcting the errors of juries was by the harsh proceeding of attain, which was productive of no remedy to the aggrieved party; and therefore the Courts did wisely to rid themselves of such an inconvenience in the administration of justice, by the milder remedy of setting aside an erroneous verdict, and sending the case back to the revision of another jury. This is by no means encroaching upon the jurisdiction of the jury, nor drawing the question to the examination of a different tribunal from that to which the constitution has referred it: for it is not substituting a different judgment in the place of that which has been pronounced; but requiring the same jurisdiction to recon-
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sider that opinion which appears to be erroneous. Without this general power in the Court, injustice would be done in many cases. With regard to the present case, two points have been submitted to the Court; the first of which goes to impeach the verdict altogether. But upon the evidence given, I do not think the ground of the action is altogether done away. A leading case upon this subject is that of *Cibber v. Sloper* (a), where the husband who brought the action was proved to have left his bed for *Sloper*. If such a man could have recovered a verdict, the very source and first principles of justice would have been contaminated. The Court therefore held clearly that the jury were bound to find for the defendant. Other cases there are where the conduct of the husband may be said to border upon vice, though perhaps not amounting to vice itself. There the circumstances go in diminution of damages. This case in my opinion approximates most nearly to that line of cases. Here was at least evidence of much indiscretion on the part of the plaintiff. Then comes the question as to the excess of damages. [Here his Lordship went through the detail of the evidence and concluded with saying;] Under all the circumstances I think the damages were much larger than ought to have been given. But here I doubt what conclusion I ought to draw from all the premises. And my difficulty arises from being unable to fix any standard, by which I can ascertain the excess which, according to my view of the case, I think the jury have run into. In many cases where the Court have said that the damages were too great, they have had some grounds to proceed upon, by which the excess might fairly be measured. But where there is no such standard, how are the errors of the jury to be rectified? What measure can we point out to them, by which they ought to be guided? If we can set aside a verdict in such a case as this for excess of damages, I presume we shall be equally warranted in so doing where we think the damages too small; and yet in Lord *Strafford's* case although the Court thought that *i. e.* damages given against him were much too small, they did not think themselves warranted in granting a new trial on that account, because they had no rule to go by. According to my judgment of this case, I think the damages are a great deal too much: Nay, I should have been satisfied even if nominal damages only had been given; but as the jury have formed a different judgment upon the evidence, I know not why my judgment

(a) *Vide Bull. N. P. 27.*

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should be preferred to their's upon such a subject. It is plain that Lord *Mansfield* in the case of *Wilford v. Berkeley* thought that the Court could not interfere in such a case. We have known instances of much greater damages than these given in these kind of cases, which were never got rid of by granting new trials. Knowing therefore no instance in which a new trial has ever been granted in such a case upon the ground of excessive damages, and the opinion of the Courts having leaned strongly against such interference even in cases which seemed to call for it as well as this, I confess, although I feel great difficulties on the one side as well as the other, I have not courage enough to make the first precedent of granting a new trial under such circumstances as the present.

ASHHURST, J. If the jury had been of opinion that the husband had consented to the adultery of his wife, they ought to have found, and probably would have found, a verdict for the defendant. So if they had even thought that he had been guilty of imprudence, that would have gone in mitigation of damages. Both these considerations were distinctly left to them by his lordship; so that no fault is to be found with the judge's direction. But yet they have found a verdict for 5000 l. damages. Now, as to the verdict having been properly given for the plaintiff, I have no sort of doubt, in so much that had it been the other way, on the present impression of my mind upon the subject, I should have been inclined to grant a new trial. As to the other question, whether this Court can set aside the verdict merely for excess of damages, I think before they can do that, they ought to be able to ascertain some rule by which the damages are to be measured, and to which the facts may be applied. Where damages depend in any wise upon calculation, the Court have some medium to direct them, by which they are enabled to correct any mistake of the jury. But where there is no such light to guide them, where the damages depend upon mere sentiment and opinion, the Court have no line to go by; and therefore it would be very dangerous for us to interfere. We have no right in such a case to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages. There is another consideration, deserving of great weight, which is, that the Court never granted a new trial in such a case as this for excessive damages; and yet many instances have occurred where the damages have been confessedly excessive.

BULLER, J. The law on this subject is now clearly settled to be that if the husband consent to his wife's adultery, it goes in bar of his action: if he be only guilty of negligence, or even loose, or improper conduct, not amounting to a consent, it only goes in reduction of damages. [He then went into a consideration of the whole evidence; from whence he inferred that there was consent on the part of the plaintiff, and therefore that the verdict ought to have been in favour of the defendant]. But at any rate I am of opinion that the Court ought to grant a new trial on the ground of excessive damages. I do not apprehend that the power of the Court to grant new trials in any case, if a proper ground be laid for it, has been denied even at the bar. It is certainly established by a variety of authorities in general terms, without making any exception whatever. And this power is repeatedly exercised in cases where the standard for damages is full as uncertain as in the present case. Every case must stand on its own particular circumstances; there is no laying down any fixed rule for ascertaining the damages in many instances. New trials have been granted from the year 1655, at least, as appears by a case of that date (a): and there one of the grounds was that of excessive damages. And that has been admitted in almost every other case since. In *Beardmore v. Carrington, C. B.* (b) all the judges agreed that the Court *might* grant a new trial for excess of damages. There are besides many old cases which shew that the instance of the exercise of this power in 1655 was not the first. One case is as far back as 7 H. 4. 31. b. though I think the Court there carried their controlling power too far. For the damages in that case being thought by the Court to be excessive, they said they would stay judgment till the plaintiff agreed to relinquish the excess. In that respect indeed they were wrong; because that was taking upon themselves to determine the exact amount of what the damages ought to have been, which is clearly the province of the jury to decide. The only power which the courts now claim is to send the case back to the revision of another jury, when they think that the damages given are enormously disproportionate to the case proved in evidence. We all of us agree that the damages are enormous in this case; and that being admitted, I cannot bring my mind to say that there shall not be a new trial. Before we can come to such a determination, we must blot out every expression in the books relative to this subject; and in

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many of them it is expressly said that the Court may grant a new trial for excessive damages. I agree that there must be facts for the Court to proceed upon in ascertaining the excess of damages, and granting a new trial on that account: but there are many such facts in this case. Besides the scandalous and indecent liberties which the husband permitted the defendant to take with his wife in his own presence, while he was engaged in a similar conduct with another woman at the time, there is another fact in this case, which is the proof of the plaintiff's having kept another woman at the time, whom he was in the constant habit of visiting. Let this fact be considered with reference to the proceedings of another court. In an action for a breach of promise of marriage, if the case be so circumstanced that a woman could not formerly have enforced the contract in the Ecclesiastical Court, no action for damages will lie. If the husband has himself been guilty of adultery, the Ecclesiastical Court will not grant a divorce; and therefore by a parity of reasoning that consideration ought to have weight in the question of damages in an action brought by him. All these facts which have been clearly proved shew that the plaintiff does not come into court with a fair case to ask for damages: but they seem to have been entirely overlooked by the jury; and therefore I think we ought to grant a new trial, that the case may be revised by another jury. Nor can I agree that the granting of this rule will put another jury under any restraint upon the subject of damages: the question will go to them unfettered; they will give what damages they please. It is enough for us to say that *these* damages are excessive.

GROSE, J. I cannot say that the jury have done wrong in finding a verdict for the plaintiff. But as to the excess of the damages given, which is the most important point, I have no difficulty in saying that my mind has balanced upon the subject during the discussion of it. It is material to observe that there is no instance in which the courts have ever granted a new trial under such circumstances as the present. And yet I am not prepared to say that no case can possibly occur upon the subject of excessive damages for criminal conversation, in which the Court ought to grant a new trial. But certainly this would be the first instance, were we to grant the present rule. Now though I think that the conduct of the plaintiff appears in several respects to have been highly culpable, yet this was for the peculiar consideration of the jury; and the law was accurately de-

delivered to them by my Lord Chief Justice, as to the effect which the several views of the subject ought to have upon the consideration of damages; and they have drawn their own inference from the whole of the case. Now if we were to grant a new trial, I should feel myself greatly at a loss to point out to the jury what line they ought to take. I cannot form to myself any standard, by which to ascertain the exact amount of the damages in these cases. And here I must advert to another difficulty which was pressed by my Lord Chief Justice, namely, that if we set aside a verdict in such a case for excessive damages, we ought also to interfere in like manner, for the sake of consistency, when the damages are too little. But what line have we to go by in declaring the damages to be too much or too little? We have known many of these cases, where very large damages have been given; particularly one of 10,000 *l.* against a person in the situation of a servant: if any thing could have warranted the interference prayed for, we may fairly presume it was that, where the damages given were tantamount to a verdict of imprisonment for life; and yet no new trial was granted. These considerations are enough to make us pause upon the subject. And I think we ought not to interfere for the first time in a case like the present, where the adulterer is a married man, and has taken away his friend's wife. Therefore without saying that no case can exist which could warrant the interference of the Court, I can certainly say in this case that I can see no ground in point of discretion for making this the first instance of such an interference.

Rule discharged (a).

(a) In addition to the cases here referred to, see *Asb v. Asb*, *Comb.* 357; *Chambers v. Robinson*, 1 *Stra.* 692; and *Clerk v. Udall*, *Salk.* 649; where a new trial was granted on the ground of excessive damages. And *Hawkins v. Scrat*, *Palm.* 314; *Ld. Townsend v. Dr. Hughes*, 2 *Mod.* 150; *Roe v. Hawkes*, 1 *Lev.* 97; *Huckle v. Money*, 2 *Wils.* 205; *Leith, Bart. v. Pope*, 2 *Bl. Rep.* 1327; and *Benson v. Fredrick, Bart.*, 3 *Burr.* 1845; where a new trial was refused on this ground: but in the two last the Court said

they had the power of granting a new trial, where the damages given appeared to be greatly disproportionate to the injury received. See also *Comb.* 170; and 1 *Burr.* 394. And in *Hurry v. Watson, Tr.* 27 *G. 3. C. B.*, where 3000 *l.* had been given in an action for a malicious prosecution, the court of Common Pleas (on a motion to set aside the verdict for excessive damages) said they had the power of granting a new trial; but the plaintiff agreed to accept 1500 *l.*

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Friday,
May 11th.

LATLESS Executrix, &c, and PATTEN against HOLMES.

An act of parliament, which is to take effect "from and after the passing of the act," operates by legal relation from the first day of the sessions.

A Motion was made in the last term to set aside some annuity deeds, because they were not registered as the annuity act directs; but the Court desired that the facts might be stated in the form of a special case, and set down for argument in this term.

The following facts were accordingly stated; In January 1777 J. Latless the testator and Patten agreed to give Holmes 960*l.* for an annuity of 120*l.* payable for his life; for securing which he executed an indenture tripartite dated 14th January 1777, and a bond and warrant of attorney of the same date. On the 13th August 1777, Patten by a deed poll assigned over his proportionable part of the annuity to J. Latless for a valuable consideration. By the annuity act 17 Geo. 3. c. 26. it is enacted that every deed, bond, &c, whereby any annuity shall be granted after the passing of the act shall within twenty days after the execution thereof be inrolled in the Court of Chancery in the manner in the said act mentioned, otherwise every such deed, bond &c, shall be null and void. That act did not receive the Royal assent until May 1777, being near four months after the execution of the said assurances; and the sessions in which the act passed commenced on the 31st October 1776. No memorial of any of the assurances for securing the annuity, or of the said deed poll of Patten, was enrolled in Chancery until the 1st December 1791, when memorials of both were enrolled. No judgment has been entered up by virtue of the said warrant of attorney, nor any action or suit commenced on the said bond. The question was whether this annuity, and the instruments by which it was secured, were void.

Bower shewed cause against the rule. The question is whether the annuity act operates by legal relation from the first day of the session to every intent and purpose. This fiction of law has certainly the effect of working the greatest injustice in many cases. It must however be admitted that, as a general principle, the law was so firmly settled in the *Attorney General v. Panter* (a), that, however unjust and absurd it may be in its consequences,

*I think, that the true construction of the act is, that it operates from the day of its passing, and by this construction, the injustice of destroying a man's security for not doing an impossibility would have been avoided. I cannot therefore but think this case a doubtful one; & one in the cited case of *Forbes v. Fanshawe*.*

(a) Dom. Proc. 1772. 6 Bro. P. C. 553.

Henley v. Jones, 1 Sid. 316. *R. v. Haydon*,

See also 4 Inst. 25. Bro. Abr. "Parliament"

1 Lev. 91. and *R. v. Call*, Comb. 413; and

pl. 86. Bro. "Relation" pl. 43. 1 And.

1 Ld. Raym. 370.

295. Hob. 111. Cro. Car. 424. Sir R.

it cannot now be shaken. But this case may be distinguished from that; and the smallest distinction ought to be readily adopted to take this case out of so rigid a construction. *Panter's* case arose upon the 7 *Geo. 3.* which enacted that a duty of 6 *d.* in the pound should be paid upon all rice exported out of the kingdom, which had been imported duty free; that act did not receive the royal assent till the 29th *June* 1767; and the question was whether it attached upon such rice as had been exported between the first day of the session and the day on which the act passed. The House of Lords held that it did. Now there the thing to be done was the paying of the duty, which might be done, although the time of exportation were passed before the royal assent was given; and therefore the thing required to be done by the act, however unjust, was possible at least. Whereas here, the time for doing the act required, namely, the enrolling the memorial within twenty days from the date of the deeds, was passed, and the requisition rendered impossible to be complied with before the command was given to do it. Then the rule of law applies that *lex non cogit ad impossibilia*. It would be a manifest violation of the first principles of justice to punish this party for not having done an act in pursuance of the statute, which the statute did not require him to do till it had become impossible. This case therefore cannot be governed by the decision of the *Attorney General v. Panter*. He also cited a case of *Forbes v. Fanshawe*, *Tr.* 1784. in *C. B.* where that court were of opinion that the words, "from and after the passing of this act," gave it's commencement from the day of its receiving the royal assent, and not from the first day of the sessions.

Shepherd, contra, was stopped by the Court.

Per Curiam. These arguments were urged at the bar of the House of Lords in the case of *The Attorney General and Panter*; but the House, by the unanimous opinion of the judges, determined that the rule of law, that, where no specific day is mentioned in an act of parliament from which it is to take effect, it commences by legal relation from the first day of the sessions, had been so long settled that it could not be shaken. In that case the act of parliament, by which the duties were imposed, referred to another act of the same sessions, which (it was contended) took that case out of the general rule: but that argument also had no weight. And it is to be remembered that the opinion of the judges there was founded on prior determinations, by one

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of which the life of a person was affected (a). With respect to the argument used in this case that, by this construction, the annuity act requires an impossibility, it must be observed that the act only renders the thing, which is done, void, unless certain requisites be complied with. And the great hardship of this case arises out of facts of which the Court can take no judicial notice: for though the day when this act received the royal assent is stated in the case, we can only know by a reference to the statute book when the act passed; and by that it appears to have passed on the 31st of October, the first day of the sessions.

If the common law had been expressly given the royal assent, would the court have declined the means of ascertaining that fact?

Rule absolute (b).

(a) *R. v. Thurston*, 1 Lev. 91.

(b) This very point was decided by this Court in *Hall v. Whalley*, H. 29 Geo. 3. on a rule to shew cause why the judgment on a warrant of attorney for securing an annuity to the plaintiff's testator should not be set aside, &c. Against the rule were cited 12 Mod. 688. Hob. 87. Plow. 18. 109.

2 Lev. 227. 2 Mod. 310. 1 Ld. Raym. 370. In support of the rule were cited 4 Inst. 25. 1 And. 295. and *The Attorney General v. Panter*, 6 Bro. P. C. 553. The Court (absent Ld. Kenyon) considered the point as fully settled in *Panter's* case; and made the rule absolute.

Friday,
May 11th.

The KING against HOLLAND.

The defendant in an information under 24 G. 3. c. 25. s. 64. must make his application for a *mandamus* for the examination of witnesses within the four first full days, if at all, after plea pleaded.

THE Court asked whether the defendant had pleaded to either of the informations filed against him by virtue of the 24 Geo. 3. c. 25. [amended by 26 Geo. 3. c. 57.] because, as they observed, a duty was imposed upon them by the 64th section of the first statute; which enacts that "when the defendant shall have appeared and pleaded to the said information, the Chief Justice or some of the justices of the said Court of King's Bench shall within ten days, [unless any *mandamus* shall be granted for the examination of witnesses as hereinafter provided, upon a motion to be made within a time to be limited by the said court of King's Bench for that purpose,] deliver the record of the said information and plea to the Lord High Chancellor," &c; The question being answered in the negative,

The Court then said this would be the most proper time to make a general rule, applicable to all persons, as to the time in which the application for a *mandamus* for the purposes mentioned in the act should be made, after the defendant had pleaded: and they desired it might be understood that such application must be made within the four first full days after plea pleaded; in default of which the record of the proceedings would be delivered to the Lord Chancellor pursuant to the act.

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BELL *against* JACKSON and Another, Bail of
STERLING.

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IN this case the *scire facias* was returnable the 13th of *February*, the last return of *Hilary* term, and the sheriff returned *scire feci*. The principal surrendered himself in discharge of his bail on the 21st of *February*. A rule having been obtained, calling on the plaintiff to shew cause why the proceedings against the bail should not be set aside, because there were not fifteen days between the teste and return of the *scire facias*,

When there is only one *scire facias* against bail, and the proceedings are by bill, there need be only four days exclusive between the teste and return of it.

Shepherd now shewed cause. When the proceedings are by bill, and the *scire facias* is served on the bail, it is not necessary that there should be a greater number of days between the teste and return of that writ than there were here, namely, four exclusively.

Mingay and *Manley*, in support of the rule, said that the proceedings against the bail were wrong upon two grounds; first, that the principal was surrendered in time; for it is said in *Imp. Pract. B. R.* 448 (a), "If there be but four days in term after the return of the writ (against the bail) the defendant shall have eight entire days in the next term to render." Secondly, that there should have been fifteen days between the teste and return of the *scire facias*. "If there be fifteen days between the teste of the first *scire facias* and the return of the second, by bill, it is sufficient, without regard to the number of days between the teste and return of each." *Imp. B. R.* 451. *Elliot v. Smith*, 2 *Str.* 1139. "If one *scire facias* only issue, and *scire feci* be returned, the time between the teste and return is not settled". *Imp. B. R.* 433. But he immediately adds "I take it there should be fifteen days in this case, which would be equal to two *scire facias*'s returned *nihil*."

Per Curiam. There is no pretence for the first objection: it is contrary to every day's practice. Nor is there any foundation for the second: four days exclusive are sufficient between the teste and return of the *scire facias*, when the proceedings are by bill. But as the defendants appear to have been misled by a book of practice in considerable repute, let the

Rule be discharged, without costs.

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Friday,
May 11th.THOMAS *against* PRICHARD.

When a prisoner pleads, he must give the plaintiff notice of his plea.

If a plaintiff do not proceed to trial or judgment within three terms against the defendant, a prisoner, the latter is not entitled to be discharged until the expiration of the third term.

BY a rule of the Court, 5 *W. & M.* If a copy of a declaration be delivered against a prisoner in *Hilary* term, and thereupon the plaintiff give a rule to appear and plead, then if the defendant appear within two days before the *Essoign* day of the next term, he may imparle until the next term: but if he do not appear within that time, judgment may be given against him. And by another rule, 2 *Geo. 1.* the plaintiff must proceed to trial or judgment within three terms. In this case the plaintiff declared against the defendant, who was a prisoner in the custody of the sheriff of *Gloucester*, in last *Hilary* term; and on the 25th of *February* the defendant pleaded the general issue by leaving it in the office, but gave no notice of it to the plaintiff. And no subsequent step having been taken by the plaintiff,

Vaughan now moved to discharge the defendant out of custody, because the plaintiff could not, according to the directions of the rule of *Geo. 1.*, proceed to trial or judgment within three terms.

Burrough opposed this rule in the first instance, on two grounds. 1st, At all events the application is too early; because, as the plaintiff has three terms in which he is to proceed to trial or judgment, the defendant is not entitled to be discharged until after the end of *Trinity* term. 2dly, The plea in this case must be considered as a nullity, the defendant not having given any notice of it. In the books of practice this is treated as a common mode of surprising the plaintiff. But in *Imp. 443*, 2d. edition, a case is mentioned, in which *Buller, J.* refused to discharge the defendant out of custody under similar circumstances, considering the plea as a nullity; though indeed that case is omitted in the subsequent editions of that book.

BULLER, J. I think that the defendant is wrong upon both points. The first would be a sufficient answer to this application. And on the second I have no difficulty in saying that the defendant should have given notice of the plea.

Per Curiam,

Rule refused.

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JENKINSON *qui tam* against THOMAS.Friday,
May 11th.

AN action of debt for the penalty given by the 21 H. 8. c. 13, (called the statute of non-residence,) was brought against the defendant as curate of the chapel of *Stalmine*, which was stated in the declaration to have been augmented by Queen *Anne's* bounty. And after verdict for the plaintiff at the last assizes at *Lancaster* before *Buller*, J. a rule was granted to shew cause why the judgment should not be arrested, on the ground that an augmented curacy was not within the operation of the statute of non-residence; against which

A curate of an augmented curacy by Queen *Anne's* bounty is not liable to the penalties of the 21 H. 8. c. 13. for non-residence-

Law and Chancery now shewed cause. The statute 21 H. 8. c. 13. §. 26. enacts, "that as well every spiritual person now being promoted to any archdeaconry, deanry, or dignity in any monastery or cathedral church, or other church, conventual or collegiate, or being beneficed (a) with any parsonage or vicarage, as all and every spiritual person or persons which hereafter shall be promoted to any of the said dignities or benefices with any parsonage or vicarage, shall be personally resident, and abiding in, at, and upon, his said dignity, prebend, or benefice, &c; otherwise he shall forfeit," &c. Now although the only words particularly specified in the act are *parsonages and vicarages*, under neither of which denominations this augmented curacy falls, yet they are only put by way of example, and the act must be taken to include *all benefices with cure of souls*; of which parsonages and vicarages were the only denominations at the time when that act was passed. So Lord *Coke* (b), in his comment on the statute 9 Ed. 2. §. 1. c. 9. *Articuli Cleri*, says "Rectors" are only named for example. The statute under consideration was undoubtedly intended to enforce a general regulation as to residence, which was before enjoined by the canon and common law. 2 *Inst.* 625. And therefore the present instance falls directly within the spirit of the regulation. And, as it was said in *Quilter v. Muffendine* (c), this statute ought to be construed liberally to enforce residence. But if there be any doubt on this statute taken by itself, yet other

(a) Vide 3 *Burn's Eccl. Law*, 282, tit. Residence, where he takes the words to be "benefices with any parsonage" &c. which he supposes to be a mistake either in the record or transcript, and that it ought to be

"beneficed"; and it is accordingly so written in *Runnington's* Edition of the Statutes.

(b) 2 *Inst.* 627.

(c) *Gillb. Eq. Rep.* 230; and 2 *Eq. Cas.* Ab. 73.

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statutes passed in the same reign, and in *pari materia*, may be called in aid to the construction of it; for though in some sense it may be considered as a penal, yet in another, and more enlarged view, it is a remedial, law. The statutes alluded to, namely, the 25 H. 8. c. 16. 28 H. 8. c. 13. & 33 H. 8. c. 28. seem to consider the 21 H. 8. c. 13. as extending to all benefices with cure of souls. Now if such be the true construction of that act this case will fall directly within the operation of it; for by 1 Geo. 1. st. 2. c. 10. s. 4. all churches, curacies, or chapels, which shall be augmented, shall be perpetual cures and benefices; and by section 6. they are made subject to lapse like all other benefices; and it has been held that *quare impedit* will lie for them. Upon the same principle it has been held in many cases, that subject matter newly created by statute may be included in former statutes upon the same subject.

Cockell, Serjt. *contra*, was stopped by the Court.

LORD KENYON Ch. J. If we had the power of legislation, perhaps we should think it proper to extend the penalties created by the statute of Hen. 8. to all benefices with cure of souls. But, as it is our duty to expound, and not to make, acts of parliament, we must not extend a penal law to other cases than those intended by the Legislature, even though we think they come within the mischief intended to be remedied. The words of the statute of Hen. 8. are "beneficed with any parsonage or vicarage:" But this is neither a parsonage or a vicarage. For wise purposes augmented curacies are made perpetual cures and benefices by a subsequent statute, 1 Geo. 1., in order that such curates may be perpetual corporations: but the act does not go on to say that they shall be considered as parsonages or vicarages; if it had, the former law would have extended to them. These curates are still bound by the canon law to reside on their benefices; but I do not think that they are liable to the penalties of the statute of Hen. 8. for non-residence.

Per Curiam,

Judgment arrested.

Friday,
 May 11th.

TRIPP *against* FRANK.

If there be an exclusive ferry from A. to B; it does not prevent persons from

going by any other boat from A directly to C, though it lie near to B, provided it be not done fraudulently, and as a pretence for avoiding the regular ferry.

THIS was an action on the case; wherein the plaintiff declared that he was possessed of *South Ferry* over the *Humber*, and that the defendant wrongfully carried persons and

cattle from *Kingston upon Hull* to *Barton* and other parts of the coast, whereby the plaintiff was injured in his right to his ferry, and lost his tolls. There was an exception stated with respect to the inhabitants of *Barton*, strangers who do not stay longer than flood-tide, and market people from the different parts of the *Lincolnshire* coast, passing and re-passing on market and fair days in market-boats. At the trial before *Buller, J.* at the last assizes for *York*, it appeared that the plaintiff was lessee of the corporation of *Kingston upon Hull*; and he proved a prescription in them to an exclusive ferry between that place and *Barton*, on the opposite coast of *Lincolnshire*, with the exceptions before stated. And it appeared that the defendant, who was the owner of a market-boat at *Barrow*, had carried over persons at different times than on market days from *Kingston upon Hull* to *Barrow*, to which place they were going, and which lies two miles lower down the *Humber* than *Barton*, upon the same coast. It was shewn that there was a daily ferry between *Kingston* and *Barton*, but none to any other part of the *Lincolnshire* coast. A verdict was taken for the plaintiff of 1 s. with liberty for the defendant to enter a non-suit in case the Court should be of opinion that the plaintiff was not entitled to recover under these circumstances. A rule *nisi* having been granted for that purpose,

Law and *Wood* now shewed cause; contending that if the conduct of the defendant could be justified in this instance, it would render a right of ferry perfectly nugatory. Every person then, by going a little to the right or left of the usual track of the ferry, may equally avoid the ferry: but that would annihilate the right itself. Perhaps it might be difficult to draw the exact line to which the exclusive right extended, but that ought to be governed by usage: now here the usage attaches upon these market boats on certain occasions; and while it allows the use of them for such purposes, it prohibits them for all others. Then as the defendant carried over several persons, who were not going to market, the plaintiff is entitled to recover. Ferries in general must have some considerable extent, upon which their right may operate; otherwise the exclusive privilege would be of no avail. That extent must be governed by local circumstances; and therefore a central situation is for the most part chosen, as that which upon the whole will be most convenient, though, from the nature of the thing, it cannot be equally convenient to all. And there is the greater reason for supporting such rights, because the owners of ferries are bound at their
peril

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peril to supply them for the public use, and are therefore fairly entitled to preserve the exclusive advantage arising from them. But they admitted, on a question being asked by the Court, that the ferryman was not compellable to provide boats to any place on the *Lincolnshire* coast besides *Barton*.

LORD KENYON, Ch. J. It seems to me that the evidence does not support this action. If certain persons wishing to go to *Barton* had applied to the defendant, and he had carried them at a little distance above or below the ferry, it would have been a fraud on the plaintiffs' right, and would be the ground of an action. But here these persons were substantially, and not colourably merely, carried over to a different place; and it is absurd to say that no person shall be permitted to go to any other place on the *Humber* than that to which the plaintiff chuses to carry them. It is now admitted that the ferryman cannot be compelled to carry passengers to any other place than *Barton*: then his right must be commensurate with his duty.

ASHHURST, J. The plaintiff's claim is so unreasonable that it cannot be supported. According to his argument, if a passenger wished to cross over from *Kingston* to the *Lincolnshire* coast three miles Eastward, he must necessarily be first carried to *Barton*, where he would be many miles distant from his place of destination; whereas, if it were not for this ferry, he might go over directly. But the admission, which the counsel have made, is decisive against the plaintiff.

BULLER, J. The question here is, what right the plaintiff has established by evidence; and that extends only from *Hull* to *Barton*, and back again. The question of fraud might arise in this way; by saying that, though the defendant really meant to go to *Barton*, he went in fraud of the plaintiff's claim a little above or below the ferry. But in this case the defendant had no intention of going to *Barton*: his place of destination was *Barrow*, at the distance of two miles from *Barton*; to which place the plaintiff's right does not extend, and to which he says he is not compellable to go.

GROSE, J. of the same opinion.

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Rule discharged.

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STEAD and Another *against* HEATON and Another.Saturday,
May 12th.

IN an action for a false return to a writ of *mandamus*, that there was no custom within the parish of *Bradford*, that the inhabitants of the chapelry of *Haworth* ought to contribute one fifth part of the money raised for the reparation and support of the parish church of *Bradford*; nor any custom for the chapelwardens of *Haworth* to make any rate upon the inhabitants of the township for church rates; several questions arose; amongst others; 1st. The custom alleged in the declaration was that the chapelwardens of *Haworth* should pay to the churchwardens of *Bradford* so much. And by the evidence it appeared that the parish of *Bradford* consisted of six townships or vills, of which the town of *Bradford* and the chapelry of *Haworth* were two; and that each of these districts nominated their own two wardens at a vestry held for the whole parish. But the wardens of the town of *Bradford* were proved to have been always called churchwardens, and did in fact superintend the parish church: and the wardens of the other townships were always called chapelwardens. It was objected that this custom was bad; for it appeared that the churchwardens alluded to were only officers for a particular township, and by law there could be no churchwardens of any other division than a parish; and taking them to mean the churchwardens of the whole parish, as upon the face of the custom they must be supposed to mean, then the evidence did not support the allegation. 2dly, The custom in question being in dispute between the town of *Bradford* on the one hand, and the chapelry of *Haworth* on the other, evidence was admitted on the part of *Bradford* of certain accounts of their own wardens in 1679; in which were the following entries; "Received of *Haworth*, who this year disputed this our ancient custom, but after we had sued them paid it accordingly, 8 l. and 1 l. for costs." And at the head of the same page was written; "It is an ancient custom thus to proportion church-lay; 1st, The chapelry of *Haworth* pay one fifth; *Bradford* a third of the remainder; and the rest to be equally divided according to the churchwardens of the several other townships in the parish." It was objected that these accounts coming out of the hands of the *Bradford* officers could not be made evidence by them of a right to call upon *Haworth* to contribute

An allegation in an action for a false return to a *mandamus* of a custom of payment by the chapelwardens of *A.* to the churchwardens of *B.* may be supported by evidence of a custom of payment to officers acting only for the township of *B.*, not co-extensive with the parish of *B.*, but who have always been described as the churchwardens of *B.*

An entry, of the receipt of money by officers of a township from the officers of another township of a proportion of church rates made in a parish book, is evidence to charge the latter officers with the same proportion in future. And another entry, explaining the proportions, made on the same page, is also admissible evidence.

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tribute towards their rates. And that at all events if the receipt were evidence of the actual payment, the other part stating the custom ought not to be so considered. Both these objections were over-ruled by *Buller*, J. at the last *York* assizes, and a verdict was taken for the plaintiffs, subject to be set aside, and a nonsuit entered, if this Court should be of a different opinion. To the first he answered that it was enough to support the custom that the officers of *Bradford* had always in point of fact been called *Churchwardens*; and therefore it was a mere matter of description. As to the second objection he said that the receipt was good evidence, because the officers of *Bradford* thereby charged themselves with the actual receipt of so much money to the use of the public, for which they were bound to account. And that as to the other writing, stating the custom, it was evidence on account of its being referred to by the receipt, and appearing to be all one document. A rule *nisi* for setting aside the verdict having been granted,

Law shewed cause against it; and *Chambre* and *Topping* again urged the same objections as before.

LORD KENYON, Ch. J. As to the first objection: these officers may have obtained the name of churchwardens of the town of *Bradford* by prescription; for church-rates depend upon prescription alone. But if that be not their legal name, it is sufficient here, for they have made their return to the writ of *mandamus* as churchwardens of the town of *Bradford*; and it is merely a name of description. And with regard to the admissibility of the evidence; it is clear that one entry was properly admitted, because it charged the parish officers with the receipt of the money: and then the entry immediately preceding it must also be admitted, because the other refers to it; in fact they are both parts of one and the same transaction, each explaining the other. Even without this reference, I do not see any objection to admitting the second entry as evidence *proprio vigore*, because usages relating to parishes must be got out of the parish books. It is like the instance of court rolls, which are frequently admitted in evidence, though they affect the rights of third persons. However it is not necessary to decide it on this ground, though I have a strong opinion upon it: but without resorting to it, I am clearly of opinion that it is admissible for the reason first given.

ASHHURST, J. According to all the rules of evidence, the last entry, of payment by the parish officers, is clearly admissible,

ble, because the officers thereby charged themselves with the receipt. Then the question is whether the other entry, explaining the custom under which the payment was made, be not also good evidence. I see no impropriety in admitting it, because it immediately refers to the other: both of them being written on the same page, and on the same subject, must be taken into consideration together.

BULLER, J. and GROSE, J. of the same opinion.

Rule discharged.

The KING *against* The Inhabitants of TOLPUDDLE.

Saturday,
May 12th.

THE justices at the quarter sessions in *Dorsetshire* confirmed an order, by which *G. Hill*, his wife, and their seven children, were removed from *Puddletown* to *Tolpuddle*, subject to the opinion of this Court on the following case.

John Chapman was the tenant and occupier of a certain farm in the parish of *Tolpuddle*, part of the stock of which farm consisted of cows, which according to the usual course of husbandry in that county had been constantly let to some dairyman. The pauper rented, under a verbal agreement, those cows of *Chapman*, being 20 in number, at the rate of 3*l.* 10*s.* per cow per annum; it was also agreed between the parties (as is usual in such contracts in the county of *Dorset*) that the owner of the cows should feed and support them, and for the purpose of feeding and supporting them in the best manner, that such cows should depasture in certain lands called the *Cow Leaze Grounds* from *May-day* to the 18th of *September*; and after that time in certain meadow grounds which are kept for that purpose, from the time the same are mowed; both which grounds were part of the said farm, and then in the occupation of *Chapman*; and when the pasture of the meadow grounds was consumed, that the cows should be kept by *Chapman* in some other of the farm grounds with his other cattle, or be foddered in the farm yard with hay by him. The land, called the *Cow Leaze*, was to be laid up by *Chapman* at *Lady-day*, and not fed upon by any cattle whatsoever until *May-day*. *Chapman* was not to feed any other cattle either in the *Cow Leaze* or meadow grounds whilst the same were fed by the cows so rented by the pauper: but the hay of the meadow grounds was cut and taken by *Chapman*, and the *Cow Leaze* ground was fed by him

The pauper rented 20 cows at 3*l.* 10*s.* per ann. each, and agreed with the farmer that they should be fed in particular fields for a certain part of the year, during which time no other cattle was to depasture there; it was held that he took a tenement within the 13 & 14 Car. 2. c. 12; and consequently gained a settlement by it.

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after the cows had quitted such grounds. In case any cow did not calve on or before *May-day*, or if any of them afterwards died, or became barren, an allowance was to be made to the pauper; and in case of sickness amongst the cattle, *Chapman* was (as is usual in such cases) to defray all expences. The pauper was not bound to repair any fence in any ground in which the cows were fed. It was further also agreed, that the pauper should have a dwelling-house on the farm, a right of feeding a mare on the farm, and keeping his pigs in the yard, and of cutting fuel for the use of the dairy; but he had no other right whatsoever. The said contract continued in force for the space of five years; during the whole of which time the pauper resided in the said house in the parish of *Tolpuddle*. The above are the usual and customary terms in such contracts in the county of *Dorset*; it is the common practice for tenants of farms to let cows upon these farms; and such letting is called a letting of a dairy.

Bearcroft, in support of the order of sessions, relied on the case of *R. v. Piddletrenthide* (a) as decisive of the present; observing that, if there were any difference, this was a stronger case than that; because here by the agreement the cows were to be fed on certain closes, to the exclusion of the farmer's possession; so that for a certain part of the year he had the exclusive possession of these fields (b).

Milles and *Bond*, *contra*, argued that the pauper gained no settlement in *Tolpuddle*, whether this case were considered on the words of the statute 13 & 14 *Car. 2.*, or on the authority of decided cases. First, By the 13 & 14 *Car. 2. c. 12. s. 1.* two justices are authorized to remove persons who come to settle in any *tenement* under the annual value of 10*l.* It is true that that act was passed to prevent vagrancy; and that the ability of the pauper has been considered as the criterion of judging whether or not the party come within it: but it must not be forgotten that the statute itself has pointed out the means of ascertaining that ability. It is therefore no argument to say that there may be other instances of ability, the statute having described the only one which is the ground-work of a settlement, namely, that of *settling on a tenement* of a certain value. Now "tenement" has a clear, known, and defined, signification. It is the operative word in the statute *de donis* (c). Lord *Coke*, in commenting upon it (d), says it includes not only all corporate inheritances,

(a) *Ante*, 3 vol. 772.

(b) Which, it was admitted by the other side in answer to a question from the Court,

were of the annual value of more than 10*l.*

(c) Stat. *Westminster 2. 13 Ed. 1. c. 1.*

(d) *Co. Lit. 19. b.*

but also all inheritances issuing out of them, or concerning, or annexed to the same; and that they may all be entailed. But "if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning land, they cannot be entailed, because they favour nothing of the realty." Whatever therefore is a tenement may be intailed; and, *vice versa*, whatever is not the subject of an entail is not a tenement. But the interest which this pauper took could not have been entailed: it was not a tenement; for it was neither the land itself, nor any interest arising out of land. It was a mere personal contract for the use of cows during a certain part of the year. The farmer did not part with the land: he still continued in law the occupier of it; and might have brought trespass for any injury done to it, or ejectment to recover the land itself; neither of which the pauper could have brought, and yet both of which he might have maintained, had he been the occupier of the land: Nay (strictly speaking) he was not even the occupier of the cows. This was not a letting of the cows, and of the fields on which they were to be depastured: but the farmer continued in possession of both; who, in order to induce the pauper to give a certain price for the milk of the cows, engaged that they should be fed on particular grounds. This therefore is not distinguishable from any other personal contract; it is like an agreement for the use or feeding of any other animals, as horses or geese; or like taking the fleece of sheep, the apples of an orchard, or the hops on an hop ground; neither of which is the taking of a tenement. Secondly; All the cases have turned on the legal meaning of the word "tenement." In *R. v. Minchinbampton* (a), the Court said that taking the pasture of a piece of ground was not more than taking the herbage, or taking a common, which could not be esteemed part of a tenement within the meaning of the statute. In *R. v. Whixley* (b), a cattlegate was considered as a freehold, which could only be devised according to the statute of frauds. In *R. v. Old Alresford* (c), where a fishery was held to be a tenement, the Court expressly said that the soil passed. In *R. v. Stoke* (d) there was a complete taking of the meadow ground for ten months; for the pauper took the hay-grass and after-math of the meadow, and fenced it. And the case of *R. v. Lockerly* (e) is expressly

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(a) *Bott.* 347: and *Str.* 874.(b) *Ante* 1 vol. 137.(c) *Ib.* 358.(d) *Ante* 2 vol. 451.(e) *Furr. S. C.* 315.

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in point. Although the words "let" and "demise" and "dairy" were in that case, the Court said that no interest in the land passed. That "A tenement must lie in tenure, and must relate to land: whereas that contract related to the cows; that it was only an agreement for the use of the cows and the feeding of them; and that it was merely personal." And notwithstanding the authority of this case was in some degree shaken in that of *R. v. Piddletrentside* (a), it may be sufficient to observe that that case may still be supported, though the interest which the pauper in this case took be not considered to be a tenement, for there the pauper took a rabbit warren, which alone (the Court said) was sufficient to give a settlement; and therefore it was unnecessary for the Court to have gone into the other point; and Lord Kenyon expressly said, that on the other point that case was distinguishable from *R. v. Lockerly*. In *R. v. Fillongbley* (b) Buller, J. said that it was better, for the sake of certainty, to abide by the strict letter of the act of parliament. Now *R. v. Lockerly* was decided upon the strict letter of the act; because the Court did not consider the taking of a dairy, which, explained as it was, was only a personal contract, to be the taking of a tenement. But even if the propriety of the decision in *R. v. Lockerly* were more questionable than it is, had it been *res integra*, yet as it has been constantly acted upon for a series of years in *Dorsetshire*, where from the mode of cultivation more questions have arisen upon this subject than in any other county, it ought now to be supported. In *R. v. Thompson* (c), where a conviction, universally admitted to be inaccurate, was supported because it was taken from the precedent in *Burn*, the Court said "That it was better for the subjects that even faulty precedents should not be shaken, than that the law should be uncertain."

Lord KENYON, Ch. J. It is certainly very much to be wished that the decisions of the magistrates below should, on examination here, be found to be consonant to the laws of the land. And I am happy to find that we are relieved from the supposed inconvenience of sending down a new code of laws to the county, where this question arose; because our opinion upon this case concurs with that formed by the justices acting in their sessions as well as that by the two justices who made the original order. From the passing of the statute of *Car. 2.* to the present time the construction put on it has been (what is called)

(a) Ante 3 vol. 772.

(b) Ante 1 vol. 458.

(c) Ante 2 vol. 18.

a liberal construction, in order to confer a settlement on those persons who have the ability to take a tenement, which the statute has established as the criterion. I confess, it seems to me impossible to reconcile the decision in *R. v. Lockerly* with our determination in this case that the pauper gained a settlement in *Tolpuddle*: but if we are of opinion that that case cannot be supported, it will be more manly to say so in express terms, than by endeavouring to make nice distinctions to induce the magistrates below to consider it as an authority hereafter. When the case of *R. v. Piddletrentbide* came before us, we all doubted of the decision of *R. v. Lockerly*; but there being another distinct ground upon which we were warranted in supporting the settlement, we were not directly called upon to over-rule that case. But now it being impossible to distinguish between this case and that, I think we are bound to deny the authority of that case, and to substitute in its room a better exposition of the statute of *Car. 2*. It has been argued that, if we decide this to be a tenement, we shall depart from the words of the statute: but in this case the pauper took a tenement, emphatically a tenement. Any thing is a tenement which is a profit out of land. In order to take a tenement it is not necessary that the party should have the fee-simple, or fee-tail; any minute interest in land is parcel of a tenement: Such minute interest indeed cannot be entailed, but all the parcels, when consolidated together, may. A beast-gate has been held to be a tenement: and yet that is not the whole land, but the profits of the land to a certain amount. So here the profits of these lands are to be taken exclusively by the cows which the pauper rented. If the cattle had been his own, and he had rented the feeding of them, that would have been unquestionably a tenement; like the taking of the pasture, the hay and aftermath: And I think that these cows were the pauper's for a certain period; they were not so far his own that he could have sold them, but they were his, that he might use them under the contract for a limited time. And this was not the less a taking of a tenement, because the pauper could only enjoy the land in a particular mode; for in many farms the tenant stipulates that he will not depasture sheep or horses on particular grounds. I do not see therefore why this is not, strictly speaking, a tenement; for the pauper had for a certain part of the year the exclusive right to the pasturage of these grounds, to be taken by the mouths of the cattle.

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ASHHURST, J. The case of *R. v. Lockerly* does not appear to me to have been decided according to the true meaning of the statute of *Car. 2.* And, being of that opinion, it is better to deny the authority of it unequivocally, lest the magistrates hereafter should act upon it. The true policy of the statute of *Car. 2.* was, as appears by the preamble, to prevent vagrants coming to settle in those parishes where there was the best stock, the largest commons or wastes to build cottages, and the most woods for them to burn and destroy; and therefore the Legislature imposed this restriction on persons coming to settle in a new parish, that they should have a tenement of 10*l. per annum*; for it was considered that if a person had credit for that, it was not probable that he would occasion the mischief, against which that act was intended to guard. Then the question here is whether it may not fairly be said that this pauper rented a tenement of the annual value of 10*l.* in *Tolpuddle*. In the first place, he had the separate possession of a house; in the next, he rented, not merely the milk of the cows, but, the cows themselves, and the land under certain qualifications; for he had a right in certain closes even to the exclusion of the farmer himself. The cows were not depastured where the lessor chose, but in particular fields; and during a certain part of the year no other cattle were to be fed in those grounds. During that time therefore the pauper had a separate pernancy of the profits of those fields, which is equal to a demise of the land itself. And though this contract did not amount to an annual demise of the land, yet during a part of the year the pauper had the separate pernancy of the profits; and it is not necessary under this statute that the party should have the tenement for the whole year. Then, as this pauper rented 70*l. per annum*, as far as the test of ability goes, he was not one of those persons described in the preamble of the statute of *Car. 2.*; and on principles of public convenience, I am of opinion that he took a tenement of the value of 10*l. per annum* within the meaning of the statute of *Car. 2.*

BULLER, J. The first question is whether this case has not been already decided; I think that it has in *R. v. Piddletrenthide*; and the arguments pressed upon us by the counsel against the order of sessions, about adhering to decided cases, ought to weigh with us in supporting that case. In that case there were two points, upon each of which the Court gave a distinct opinion; in determining one of them it became necessary to take into consideration the case of *R. v. Lockerly*, which we all thought

thought was wrongly decided. But it has now been argued that the case of *R. v. Piddletrentbide* is no authority for the present, because it was decided on the other ground, namely, the taking of the rabbit-warren, and that what was said by the Court in that case, relative to the dairy, was extrajudicial: Perhaps if a question were to arise hereafter on the other point, the taking of the warren, the same argument would be applied in that case, and it would be contended that *R. v. Piddletrentbide* was decided on the dairy, and not on the rabbit-warren; and thus the case, which we consider to have been rightly determined on two grounds, would be frittered away, and would be no authority upon either. But I think that that is not extrajudicial, which is made a point in the case, and argued upon at the bar. The case of *R. v. Piddletrentbide* therefore I consider as a decided authority on this very point. Then it was contended that the great criterion is the ability of the pauper, as marked out by the statute. Now this pauper had the ability to rent 70*l.* *per annum*; and the question is whether that did not gain him a settlement. Against it, it is said that he had no interest in land, that the particular fields were not the object of his contract, that he merely rented the cows, and that the whole was a personal contract: but I think that he had an interest in land, and that unless he could have had all the profits of the meadow for a certain part of the year, he would not have taken the cows. Another argument was, that, because the pauper had not an interest which could be entailed, it was not sufficient to confer on him a settlement. But whether a thing may or not be entailed depends upon the *subject matter*, and not upon the *interest* which the party has in the subject. Here the interest which the pauper had could not be entailed on account of the imbecility of his estate. But supposing his interest, which was only temporary, had been perpetual; Suppose *A.* had granted to him and his heirs the right of depasturing 20 cows for six months in every year; I think that might be entailed. But this case goes still farther; because by the very terms of the contract no other cattle, not even those of the farmer himself, were to be fed on those particular grounds on which the pauper's cows were to depasture; therefore he had the exclusive possession of those fields during that time. This goes a great way to answer the difficulty stated at the bar; for, as at present advised, it seems to me that if the pauper had the sole possession, or, which is the same thing, the sole profits, he might have

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maintained trespass (a): but on that point it is not necessary to give a decisive opinion.

GROSE, J. I was always surprised at the determination of *R. v. Lockerly*; because the pauper took a dwelling-house as well as the dairy, and the case happened after it had been decided that a windmill and a rabbit-warren severally gave a settlement. The case of *Kinver and Stove* (b) was the ground of my opinion in *R. v. Piddletrentbide*; for there the Court said "A mill has been held to be a tenement, and why not this (a rabbit-warren)? It is his ability to pay 10*l.* *per annum*, that is the foundation of the settlement; and whether he pay it for a house for habitation, or for a warren, which brings him in a profit, is not material." In *R. v. Priddletrentbide* we were all of opinion that the case of *R. v. Lockerly* was at least doubtful. And as this cannot be distinguished from it, I have no difficulty in saying it cannot be supported; as being directly contrary to the construction uniformly put on the statute of *Car. 2.*, which has turned on the ability of the pauper. But here the pauper came to live in a dwelling-house in *Tolpuddle*, and took a certain interest in the land, explained in the case to be the pernanacy of the profits of the land, to the exclusion of the owner, to the amount of more than 10*l.* *per annum*; which I am of opinion is sufficient to give him a settlement in that parish.

Both orders confirmed.

(a) *Vid. Welch v. Hall, Bull. N.P. 85.*

(b) 1 *Str.* 678.

Monday,
May 14th.

DAVIS against DINWOODY.

Husbands and
wives cannot
in any case
be witnesses
either for or
against each
other.

THIS was an action by the executrix of a surviving trustee under a marriage settlement of *J. Lewis* in 1780, by which certain household goods, mentioned in a schedule annexed to the deed, were settled to the sole and separate use of *Lewis's* wife; and it was brought against the defendant, sheriff of *Monmouthshire*, to recover back the value of some of those articles, which had been seized and sold by him under an execution against *Lewis*. At the trial at *Monmouth* before *Grose, J.* *J. Lewis* was called as a witness to prove the identity of the goods: the defendant's counsel objected to his competency, and it was said that he was interested; to which it was answered that he came to speak against his interest; for that if these goods, which had been seized, were not his own and could not be taken

to pay *his* debt, he would be liable afterwards. Whereas, if they could be taken in execution, his debt would be discharged. The learned judge admitted the witness, but reserved the point.

Adair, Serjt. having obtained a rule to shew cause why the verdict for the plaintiff should not be set aside, and a new trial had,

Bower and *Lane* now shewed cause against it; arguing that the husband was a competent witness in this case, because he was not interested. The rule with regard to admitting husbands, or wives, as witnesses, is accurately laid down in the law of *Nisi Prius* (a), where it is said "that husband and wife cannot be admitted to be witnesses *for* each other, because their interests are absolutely the same; nor *against* each other, because contrary to the legal policy of marriage." And this rule appears to be warranted by the cases; *Broughton v. Harpur*, 2 *Ld. Raym.* 752; and *Bentley v. Cook*, cited in *R. v. Cliviger*, *ante*, 2 *vol.* 265, went on the ground of interest; and 1 *Brownl.* 47; and *R. v. Cliviger*, *ante*, 2 *vol.* 263., on the policy of marriage. Then the only ground, on which husbands or wives are rejected, when speaking *for* each other, is that of interest; but here the interest was the other way. And if the ground of interest be laid out of the case, it was not against the policy of marriage to admit this husband; for this was an action against the sheriff, in which the wife's interest does not at first appear to be affected; and if the Court take notice of the situation in which the husband stood, they must see that the interest of the wife was *sole* and separate from that of her husband. In *Williams v. Johnson* (b), to an action against the daughter's husband for wedding clothes, the defence was that the goods were furnished on the credit of the father; to prove which the mother, who was present when the goods were bought, was called to charge her husband, and allowed.

Lord KENYON, Ch. J. (stopping *Adair*, Serjt. and *Caldecott*, *contra*). Independently of the question of interest, husbands and wives are not admitted as witnesses either for or against each other: from their being so nearly connected, they are supposed to have such a bias upon their minds that they are not to be permitted to give evidence either for or against each other.

BULLER, J. It is now considered as a settled principle of law that husbands and wives cannot in any case be admitted as witnesses either for or against each other.

Rule absolute.

(a) *Bull. N. P.* 286.

(b) 1 *Str.* 504.

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Monday,
May 14th.GOODTITLE on the Demise of GALLAWAY against
HERBERT.

A parol agreement to lease lands for four years only creates a tenancy at will; and if that tenancy be not determined before the day of the demise laid in the declaration the plaintiff cannot recover.

THIS was an ejectment to recover the possession of a farm which had been holden for a term by the defendant's late husband; and which expired, as to part of the premises, at his death, and as to the rest at the *Lady-day* after his death. The tenant died in the latter part of the year 1790; and on the 21st of *November* in that year an agreement was entered into between the defendant and the lessor of the plaintiff's father, that she should continue in possession of the premises till *Michaelmas* 1791, and pay a rent of 60*l.* In the Spring 1791 it was agreed between the lessor of the plaintiff and the defendant, that the defendant should hold the farm from *Michaelmas* 1791 for 4, 8, or 12, years, at a rent of 78*l. per annum.* There was no memorandum in writing made, nor any lease executed. The demise was laid on the 1st of *October.* Possession was demanded on the 5th of the same month, and refused. Some repairs were done by the tenant in pursuance of the agreement three or four days after the agreement was made. The jury found for the defendant; and the plaintiff had leave to move to enter a verdict for him, if the Court should be of opinion that the agreement did not, under the circumstances, entitle the defendant to hold the possession against this ejectment.

Lane obtained a rule on a former day, calling on the defendant to shew cause why the verdict should not be set aside; which was now opposed by

Manley, and *Wigley*, on two grounds. First, the defendant had an equitable title, because he had made repairs under the agreement; or Secondly, He had a right to retain the possession to a day subsequent to the demise. For if the defendant were to be considered merely as tenant at will to the lessor, the latter could not determine his will in the middle of a quarter. *Timberley v. Grobham-how*, Sir T. Jones 5. *Stonfil v. Hicks*, Salk. 413. and *Bree v. Lees*, 2 Bl. Rep. 1171. The statute of Frauds (a) enacts that "all leases of land by parol, and not put in writing, and signed by the parties, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect."

(a) 29 Car. 2. c. 3. s. 1.

Then

Then the defendant was a tenant at will, and consequently not a trespasser till the will was determined; *Birch v. Wright*, ante 1 vol. 378; and 383. Now the lessor's will was not determined till the 5th of *October*, and the day of the demise was on the 1st of *October*. The plaintiff therefore cannot recover in *this* ejectment.

LORD KENYON, Ch. J. The statute of frauds says that such an agreement as the present shall only have the effect of creating a tenancy at will. Now a tenant at will is not a trespasser. Here the tenancy was not determined until after the day of the demise in the declaration; and consequently the plaintiff cannot recover.

Per Curiam,

Rule discharged.

CALCRAFT *against* GIBBS.

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May 14th.

TO this action, on the statute of *Anne*, for keeping and using a gun for the destruction of game, without being qualified, and also for shooting without a certificate, the defence made at the trial at *Maidstone* before *Gould, J.* was under a deputation, granted by Mr. *Roebuck*, as lord of the manor of *North Fleet*. The plaintiff produced a grant from the crown to him of the manor of *North Fleet*; and the defendant had purchased *Ingress* of him, which lies within this manor. The learned judge thinking that the question respecting the boundaries of a manor ought not to be tried in an action on the game laws, the plaintiff was nonsuited, but he had leave to move to set it aside.

It is no defence to an action for penalties on the game laws that the defendant has a deputation from a person claiming to be lord of the manor, if there appear to be no ground for the claim.

Shepherd on a former day moved to set aside the nonsuit, on the ground that Mr. *Roebuck* had not only no title, but not even a claim of title to the manor; for that the granting of this deputation was his only exercise of right.

Bond, Serjt. was to have shewn cause against this rule: but

The Court thought the point too clear for argument; for that though the judges at *Nisi Prius* had frequently refused to enter into a minute discussion of the boundaries of manors in actions on the game laws, one instance of which was mentioned as having happened some years ago at *Stafford* before Lord Ch. J. *Wilmot*, yet that in the present case there was no pretence of title in Mr. *Roebuck*. And therefore they made the

Rule absolute (a).

(a) *Hankins v. Bailey*, *Bridgewater Summer Assizes* 1791. In an action for a pe-
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nalty under the game laws for shooting a pheasant, *Buller, J.* nonsuited the plaintiff;
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it appearing that the defendant was gamekeeper of Sir *Richard Hoare* of his manor of *Bruton*, and had, as such, constantly shot over the place where the pheasant was killed; no evidence being given that the place was out of the manor. And he said he would not put it upon the defendant to prove that the place was within the manor, (though pressed by the plaintiff's counsel so to do,) for that he would not in such an action try the boundaries of the manor.

Blunt v. Grimes, Salisbury Spring assizes, 1789. This was an action of debt brought for penalties under the game laws. The killing being proved; it appeared that the defendant was gamekeeper to Lord *Shaftesbury*, and that Lord *Shaftesbury* was owner of the lands where the game had been killed. *Bond* on his behalf opened a case of title to the manor in Lord *S.* and derived it through several ancient deeds as far back as the reign of *Queen Elizabeth*. Besides which he offered to shew a seisin in fact of Lord *S.* and his ancestors, by repeated acts of ownership, and exercise of manerial rights, by felling timber on the wastes &c, as far as the oldest witnesses could remember, which would be sufficient in this case.

Morris, for the plaintiff, interrupted him, by saying that he knew of no distinction intended to be taken between the evidence in this case and any other. That this action had been agreed to be brought between the parties expressly to try the right to the manor in question; that they were aware that Lord *S.* had exercised acts of ownership, which was the very thing complained of; and that the plaintiff was ready to prove by ancient writings and records, that the plaintiff was lord of the manor.

BULLER, J. observed that it was not competent to the parties to enter into any such agreement; nor should he give his assent to it. He was clearly of opinion that this was a very improper mode of trying the ancient right to the manor. For he should hold that if the defendant proved only a colourable title in Lord *S.* as lord of the manor, and the exercise of those manerial rights in fact, which had been opened, that would be a sufficient defence against the penalties of the act, and he should direct the jury to find for the defendant.

Whereupon, by agreement, the record was withdrawn.

Monday,
May 14th.

ENGLAND on the Demise of SYBURN against SLADE.

In the case of a plain trust, where the trustees were directed to convey to a devisee on his attaining 21, the jury may be directed to presume a conveyance at any time afterwards, though considerably less than 20 years.

In ejectment by landlord against tenant whose lease is expired, the latter is not barred from

THIS was an ejectment for an estate in *Lewisham* called the *George Inn*. The estate belonged originally to one *George Pym*, under whom the lessor of the plaintiff held a lease of it for twenty-one years, which expired at *Lady-day 1791*. *Syburn* under-let to the defendant from *Christmas 1789* to *1790*, who held on, and had regular notice to quit at *Christmas 1791*.

The counsel for the lessor of the plaintiff objected at the trial before *Gould, J.* at *Maidstone* to any evidence being received as between landlord and tenant of the landlord's title having expired; but in this he was over-ruled: and the defendant shewed as above mentioned the expiration of the lease under which the lessor of the plaintiff claimed. In reply to this another lease to the lessor of the plaintiff was given in evidence from one *John Pym* a natural born son of *George Pym*, dated shewing that his landlord's title is expired.

Long v. Allen.

Case v. Holford Law of N.Y. Pri. 110.

England & ^{on dem. of} Lyburn v. Hade A. Durnf.
East 602.

Goodtitle on dem. of Hunt v. Knot Corp. 43.

46. on dem. of
Doe v. Powerman v. Jones b. Durnf.

East 2.

Goodtitle on dem. of Jones v. Jones & J.
Durnf. East 47.

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16th October 1789, for eighty-eight years from 16th February 1791; and it was proved that *John Pym* claimed under the will of *George Pym*, dated 31st December 1777, who thereby devised the estate in question to the use of trustees in trust for *John Pym*, and to convey the same to him immediately on his attaining twenty-one; and in the mean time for his maintenance. *Pym*, the son, came of age in September 1788. No conveyance from the trustees to *John Pym* was proved; and therefore it was objected that, the legal estate being in the trustees, the lease ought to have been granted by them. To which it was answered that this was the case of a plain trust, and that a conveyance should be presumed. But *Gould, J.* thought the objection valid; and that there was not length of time sufficient to raise such a presumption. The plaintiff therefore was nonsuited; but he had leave to move to set aside the nonsuit, and enter a verdict for him, if the Court should be of a different opinion. For which purpose

Bond, Serjt. obtained a rule *Nisi* on a former day, insisting upon the above objections; which were now opposed by

Shepherd on the same grounds as at the trial.

Lord KENYON, Ch. J. [to whose opinion the other judges assented]. As to the first objection there is nothing in it. It was certainly competent to the defendant to shew that the lessor's title had expired; and that he had no right to turn him out of possession. As to the other objection, I do not know that *Pym* had not the legal estate in him. There is no reason why the jury should not have presumed a conveyance from the trustees to him, upon his attaining the age of twenty-one, in pursuance of their trust; according to what was said by Lord Mansfield in *Lade v. Holford* (a). It was what they were bound to do; and what a court of equity would have compelled them to have done if they had refused. But it is rather to be presumed that they did do their duty. And as to the time, the jury may be directed to presume a surrender or conveyance in much less time than twenty-years.

Rule absolute.

(a) Bull. N. P. 110.

1792.

Friday,
May 18th.The KING *against* G. PEACOCK.

The Court will not grant a *quo warranto* information to impeach a derivative title, if the person, claiming the original title, has been in the undisturbed possession of his office six years.

A RULE was obtained, on reading certain affidavits and on seeing the record of the proceedings in the cause of *R. v. Brown*, calling on the defendant to shew cause why an information in nature of a *quo warranto* should not be exhibited against him, for exercising the office of a common council-man of *York*. The affidavits disclosed the constitution of the city as far as it respected the election of common council-men; and the mode of election is this "within fifteen days after the death or removal of a common council-man, the common council meet and nominate three persons, citizens of the city, to the mayor, aldermen, and sheriffs, and those who have been sheriffs, who elect one of them to succeed to the office of common council-man." And they stated that on a vacancy the defendant, *Brown*, and *Robinson*, were in *October* 1788 nominated by the common council to the mayor &c, &c, that they might elect one, and that they elected the defendant. The record referred to in the affidavits was a *quo warranto* information against *Brown* for exercising the office of a common council-man of *York*: many issues were there joined; one of which was on "a custom that no person can be admitted a freeman but by right of servitude to some other person using some trade within the city or suburbs for seven years, and unless he has truly served as an apprentice under such indenture"; which was found against *Brown*: this was the objection to his eligibility as a common council-man; and there was judgment of ouster against him. It also appeared that *Brown* had been in the undisturbed possession of his office as a freeman, or citizen, for thirteen years.

Bower, and *Clayton*, Serjt, shewed cause against this rule. First, The Court will not suffer a derivative title to be impeached in a *quo warranto* information until there be judgment of ouster against the person under whom the title is derived. *R. v. Spearing*, ante, 1 vol. 4. n. a. Nay, the Court will permit persons claiming such titles to defend an information against such original title. Now here *Brown* himself has been in the undisturbed possession of his office as a freeman so long that the Court would not suffer any individual to impeach his title: and if it cannot be attacked directly, it ought not to be impeached in this collateral way. The record against *Brown* would be

no evidence against this defendant: and even upon that record there is only judgment of ouster against him from his office of common council-man, which leaves him still in possession of his prior office of freeman. If the real ground of objection to *Brown's* title as common council-man had been stated to the Court, they would not probably have suffered it to be questioned, as he had been a citizen *de facto* for thirteen years, and his not being a citizen *de jure* was the only objection to his subsequent election to the office of common council-man (a). Secondly, *Sinclair*, who makes this application, has admitted the legality of the defendant's title, by accepting his vote at his own election of Recorder of York; and therefore he ought not to be permitted to question his title. *R. v. Stacy*, ante 1 vol. 1. and *R. v. Mortlock*, ante 3 vol. 300.

Erskine, *Law*, *J. Heywood*, and *Holroyd*, in support of the rule. It clearly appears that the defendant has no legal title to the office he holds. For by the custom three citizens must be returned to the mayor &c, for them to elect one; and if three good citizens be not returned, it is a bad return: now *Brown*, one of the three sent up with the defendant, was not a legal citizen. If *Brown* were not a freeman *de jure* so as to support his own election to the office of common council-man, he cannot support the election of another. Every reason, which appears sufficient to disqualify *Brown*, equally applies against the defendant. And, as the Court granted an information against *Brown* for exercising the office of common council-man, and permitted (b) his title as a freeman to be questioned in that information, although he had been in the quiet possession of his office for twelve years, they will not object to grant another information against this defendant, whose title must be bad if *Brown's* were so; and there is no objection to this information on account of the length of possession.

LORD KENYON, Ch. J. The argument is that because we erred once, in granting the information against *Brown*, we ought to commit a similar error in this case. But I think that, if all the facts had been disclosed to us when the information was prayed for against *Brown*, we should not have granted it. The present application is made to the discretion of the Court; not indeed to the arbitrary, but the sound, discretion of the Court under the statute. Now we very recently laid down this rule,

(a) The information against *Brown* was granted on a supposed defect in his election

as common council-man.

(b) *Ante* 276.

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The King
against
G. PEACOCK.

that, in order to preserve the peace of corporations, we would not suffer the title of a corporator, who had been in the undisturbed possession of his franchise for six years (*a*), to be impeached by a *quo warranto* information on the relation of any private person. And when we laid down that rule, we were influenced by this consideration that it might prevent corporations being thrown into confusion. Now in this case the election of *Peacock* depends on the title of *Brown*, who was elected in 1779, and who has *de facto* been in the possession of his office as a freeman since that time. And it has been argued that, though we will not grant a *quo warranto* information against *Brown* himself for exercising the office of a freeman, because he has been in the possession of his office for so many years, we ought to suffer the defendant's title to be impeached, who trusted to the visible exercise of *Brown's* right for so long a time. But if *Brown's* title is not to be attacked directly, we ought not to permit it to be done in this collateral way. The argument amounts to this, that *Brown* shall continue a corporator to all intents and purposes, and yet shall not do any corporate act. I am therefore clearly of opinion that this rule ought not to be granted. In the course of the argument I doubted whether *Sinclair*, who had availed himself of the defendant's vote at his own election, ought not to pay the costs of this application. But on further consideration I think that he ought to be protected from paying the costs by reason of the proceedings against *Brown*, and that the justice of this case will be satisfied by discharging the rule without costs.

ASHHURST, J. The meaning of the rule, that we would not suffer the title of a corporator to be impeached after a quiet possession for six years, is, that after that time he shall be taken to be a good officer to all intents and purposes. Now here it would be extraordinary if we were to permit the title of *Brown* to the office of a freeman to be questioned in this indirect mode of proceeding, when it is admitted that it cannot be done directly. It appears that the previous qualification to being admitted a common council-man of *York* is that the party be a freeman, and be returned with two other freemen to another body, consisting of the mayor, &c.: it is not disputed but that the defendant is a freeman, and it appears that he was returned to the mayor &c, with two others, who have been in the quiet possession of their offices, of freemen, for many years.

(*a*) *Vid. Stat. 32 Geo. 3.*

GROSE, J. (a) Two objections have been made to this application; and it would be sufficient, in order to discharge this rule, to say that the relator, who has made use of the defendant's vote, on a supposition that he was a common councilman *de jure*, ought not to be permitted to dispute the legality of his election. On the other ground also, I think that the rule ought to be discharged. It is not sworn that *Brown* is not a freeman; but we are told that by referring to another record we must see that he is not. But in the first place, that record would not be evidence on the trial of this cause; and if we recollect what passed in that cause, we must recollect the whole of it; and it was only, because the Court were misled, that the information was granted in that case.

Per Curiam.

Rule discharged.

(a) Buller J. was sitting for the Lord Chancellor.

LEERY *against* GOODSON.

Saturday,
May 19th.

THIS was a special action upon the case. The declaration stated that the plaintiff having distrained some pictures on *Poole*, his tenant, and being about to sell them, the defendant, in consideration that the plaintiff would return the goods to *Poole*, undertook to pay the plaintiff a certain part of the rent in a week, and the rest in a month, yet that he did not pay &c. There was also another count for money had and received. On the trial it appeared that the agreement was that the plaintiff should deliver the pictures to the *defendant*, and not to *Poole*; upon which it was objected that the evidence did not support the contract declared upon. Lord *Kenyon*, before whom the cause was tried, thought it was a fatal variance, but a verdict was taken for the plaintiff, with liberty to the defendant to move to enter up a non-suit, if this Court should be of opinion that the plaintiff ought not to recover.

Law having on a former day obtained a rule to shew cause why the verdict should not be set aside, and a non-suit entered,

Erskine now shewed cause against it. He abandoned the special count, but said that the plaintiff might resort to the general count for money had and received; for as the defendant could not but know on the face of the record that the cause of action was the value of the pictures, he could not be surprised by the plaintiff's insisting to recover that value on either of the counts.

Evidence of an agreement to deliver goods to defendant is a fatal variance from a count on an agreement to deliver them to another person. Goods distrained by plaintiff were delivered by him to defendant on his promising to pay the rent; an action for money had and received will not lie for the value of the goods though defendant do not pay the rent.

In

1792.

LEERY
against
GOODSON.

In *Longchamp v. Kenny* (a), the plaintiff, a waiter in one of the Subscription houses in St. James's-Street, to whom a ticket for a masquerade had been delivered for the purpose of sale, put it into his master's hands, who would not afterwards account for it; and the Court held that the waiter might recover the value of the ticket in an action against the master for money had and received. So here, as the pictures were not re-delivered to the plaintiff, he may recover the value of them on the count for money had and received.

Sed per Curiam. In the case cited the ticket was delivered for the purpose of being carried to market; and the presumption was that it was sold, as the defendant would give no account of it. But here a contrary presumption arises; for the pictures were delivered to the defendant in order to avoid their being sold.

Rule absolute.

(a) Dougl. 137. 3d Edition.

Saturday,
May 19th.

BARLOW against KAYE.

If an action be brought on a judgment which is irregular, the whole proceedings may be set aside in one rule.

THE present plaintiff, having signed judgment of *non-pros* in another action brought by the defendant against him, brought an action upon that judgment. But the judgment of *non pros* being irregular, the defendant obtained two rules, the one to set aside that judgment for irregularity, the other to set aside the proceedings in this action founded upon the judgment. And now the plaintiff obtained another rule, calling on the defendant to shew cause why the last of those two rules should not itself be set aside; on the ground that one rule would have answered the purpose of both, and that the latter was therefore an act of oppression in the defendant; against which

Bower shewed cause. He admitted that, if the plaintiff had sued out execution on the judgment of *non pros*, all the proceedings might have been stayed by one rule; because there all the proceedings would have been in one action: but he argued that the same reason did not apply to this case where an action had been brought on the judgment, because now there were two separate causes in court, and therefore it would have been a fraud on the revenue by including two rules, in two distinct actions, in one stamp.

Manley, in support of the rule, said that in effect there was no distinction between an execution and an action upon the judgment in this respect; and that it was the invariable practice of the Court to grant one rule only to set aside an irregular judgment, and the subsequent proceedings on that judgment, in whatever mode the party may have proceeded after the judgment. That it was so in proceedings against bail, where there are different actions even against different persons; the one against the principal, the other against the bail; and that in such cases it is necessary to entitle the cause in the original action. And of this opinion were

1792.

BARLOW
against
KAYE.

The Court; who said that as the original action was the substratum of the whole, if that failed the subsequent proceedings had upon it, whether by execution or another action, also failed with it; and that the whole might be set aside in one rule. That it was the practice so to do in the instance alluded to, of actions upon bail bonds; and that they ought for the sake of economy to the suitors to adhere to that practice.

Rule absolute.

The KING on the Prosecution of T. ALLEN
against The Mayor &c of STAFFORD.

Saturday,
May 19th.

A *Mandamus* having been granted to the defendants to admit a freeman, they made a return to it, which was traversed; and the plaintiff not having proceeded to trial at the last assizes according to the practice of the Court,

Judgment as
in case of a
nonsuit may
be given in a
traverse of a
return to a
mandamus.

Lane obtained a rule to shew cause why there should not be the like judgment as in case of a nonsuit. This was now opposed by

Leycester; who said that this was not a case within the 14 Geo. 2. c. 17; because that only extends to "causes between party and party." But

The Court said that they were informed by the officers of the crown that there were several instances, in which the Court had given the like judgment as in case of a nonsuit in similar cases. And therefore they made the

Rule absolute.

Leycester then moved to amend the *mandamus*, alleging that the prosecutor had stated the custom of the borough, relative to

The Court
will not
amend a
mandamus

after a return has been made to it,

the

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The KING
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&c. of
STAFFORD.

the admission of burgesses, too narrow. Cause was shewn against this, on a subsequent day (a), by

Erskine and *Lane*, who relied on there being no precedent for such an amendment.

Per Curiam. The officers inform us that in Lord Ch. J. *Lee*'s time such an application was made, and refused. And we think that, at all events, in such a case as the present, where the return has been traversed, we ought not to permit the amendment to be made. The parties may apply for another writ.

Rule discharged.

(a) Monday, May 21st.

Saturday,
May 19th.

HOWELL and Others *against* MAC IVERS and Others.

An assign-
ment of a
chose in
action need
not be by
deed.

ASSUMPSIT on a contract by three. Plea, the bankruptcy of one of them before the action brought. Replication that before his bankruptcy *he assigned his interest* in the contract to the other two. To which there was a general demurrer; in support of which,

Russell contended that the replication should have stated how the assignment was made; by what deed; so that the defendant might have craved oyer of it. In *Winch v. Keeley* (a), the assignment was by deed which was set out, and therefore this objection did not occur; though the Court there held that the interest which the bankrupt had assigned before his bankruptcy did not pass to his assignees under the commission.

Wood, contra. It is not necessary that an assignment of a chose in action should be by deed, and therefore it is no ground of demurrer that it is not so stated.

The Court were of the same opinion; but they gave leave to the defendant to withdraw the demurrer, and take issue on the assignment.

(a) Ante 1 vol. 619.

1792.

SMITH *against* WOODCOCK.Saturday,
May 19th.The Same *against* DUDLEY.

THE first of these was an action by the holder against the drawer of a bill, the second against one of the indorsers. There was also another action pending by the same plaintiff against another indorser, and a fourth action against the acceptor, who had refused payment. A rule *nisi* was obtained on behalf of *Woodcock* and *Dudley*, why upon payment of the amount of the bill and the costs of these two actions all proceedings should not be staid against them.

Lawes opposed the rule, on the ground that the costs of the other actions should also have been paid. But

Per Curiam, That is only necessary when the application for staying proceedings comes from the acceptor, who is the original defaulter, and against whom all the costs occasioned by his default may be recovered.

Rule absolute.

If separate actions be brought against the acceptor and indorsers of a bill, the Court will stay proceedings against any of the indorsers on payment of the bill and costs of that action, but not against the acceptor without payment of costs in all the actions.

The KING *against* HOLLAND.Monday,
May 21st.

A Board of inquiry having been appointed in *India* for examining into certain charges of peculation and corruption against the defendant, who filled an office of great trust and importance under the *East India* Company; and that board having examined witnesses and made a report upon the matter which was transmitted home; in consequence of which an information had been filed by the Attorney General against the defendant (*vide ante* 457); a rule *nisi* was obtained on the part of the defendant for an inspection of that report; against which

The *Attorney General*, *Bearcroft*, and *Rous*, now shewed cause. There never was yet an instance of such an application as the present to give the defendant an opportunity of inspecting the evidence intended to be produced against him upon a public prosecution. It would lead to the most mischievous consequences. If the Court thought it proper to refuse a similar application in the case of Dr. *Purnell* (a) on the part of the crown,

Where an information is filed by the attorney-general against an officer of the *East India* Company on charges of delinquency there, founded upon the report of a board of enquiry in *India*, the defendant has no right to have an inspection of that report, nor has this court any discretionary power to grant it.

(a) 1 *Will.* 239.

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The KING
against
HOLLAND.

the reason holds much stronger against such an application on the part of the person accused. There too the inspection prayed for was of the statutes and archives of the university, which are documents of as public a nature at least as the report in question. A defendant might as well apply for the examinations of witnesses before a grand jury on a common bill of indictment. The very act of 7 *Anne* c. 21. §. 11. by which in cases of high treason it is provided that the party accused shall have, besides a copy of the indictment granted by 7 & 8 *W. 3.* c. 3. the names of the witnesses to be brought against him, shews that, at common law, he was not entitled even to that degree of indulgence: but the present application goes a step beyond that; for the effect of this application, if successful, would be not only to inform the defendant who were the witnesses to be examined against him, but also the whole detail of their evidence.

Erskine and *Bower*, *contra*, said, that this application was not novel in its principle, whatever it might be in the particular instance. The Court have repeatedly determined that corporation books may be inspected on the ground of their being public documents; and that reason extends in a still stronger degree to the public documents of the kingdom. Of that nature is the paper in question. The Board, before whom the inquiry was instituted, was appointed for public purposes. The object of the inquiry was the supposed existence of public grievances; not confined merely to the private misdeeds of the defendant, but as connected with his public administration: On that account it may be resembled to the public proceedings of parliament in this country. There is an additional reason for granting the indulgence in this case, namely, the great distance of the scene of action, and the hardship of putting the defendant to the enormous expence of sending for witnesses from *India*, whom after all perhaps it may not be necessary to examine.

Lord KENYON, Ch. J. I am extremely clear that we ought not to grant this application. There is no principle or precedent to warrant it. Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the whole system of criminal law. In treason and felony, where the punishment is infinitely greater than can be inflicted in this case, no such indulgence was ever granted. In only one case, treason, which is particularly provided for by statute, is the prisoner

soner entitled to a copy of the indictment. And in this case the defendant derives much more intelligence from an inspection of the information than could be received from a copy of the indictment in ordinary cases; because the particulars of the offence are fully disclosed in this information. Lord *Somers*, and Sir *J. Holt*, in framing the statute of *Anne*, thought it a great indulgence to furnish a person accused of high treason with the names of the witnesses to be produced against them. But it never occurred to them that the rule, even in the case of treason, should be extended as far as this application seeks to go; for here the application is made for a copy of the substance of the evidence, which is to be produced against the defendant.

ASHHURST, J. In other cases, a defendant has no other intimation of the particular charge intended to be brought against him than what appears upon the indictment or information. Nor was it ever conceived to be necessary or fit that he should receive intelligence of the particular evidence, by which the charge was to be made out. And I should be sorry if such a rule were to be laid down in any case.

BULLER, J. This motion has been made on two grounds; first, as a matter of right; and secondly, as a matter of discretion. The last I will dismiss first, because I am very clearly of opinion that we have no discretion upon the subject. We must proceed according to the act of parliament: and if that give the defendant a right to have the information which he seeks, it takes away our discretion; and if the statute do not give it, we cannot assume a discretionary power. And with regard to the question of right; not a single clause has been pointed out in any of the acts of parliament relating to the affairs of *India*, that gives such a right. Whatever might have been done in *India* cannot affect the proceedings in this Court; we must decide according to law, when the application is made to us. There is a striking instance of the rule by which we ought to be governed now, in a case before Lord *Holt* the day before the statute, relating to treason, passed. For when the bill had passed both houses of parliament, the counsel for a defendant applied to the Court, desiring them to assign counsel. But Lord *Holt* said that, as the act had not then received the royal assent, the Court could not listen to the application. So here, we are not to consider what is convenient to be done, (though indeed no convenience requires it) but we must act according to the

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statutes; and in them there is nothing which requires us to comply with the terms of this application. At first, I thought that this was a motion of the first impression: but I find that in the case cited, of *R. v. Purnell*, the rule for inspection is confined to civil cases, and those where the party applying is interested in the papers. In ordinary cases when an indictment is found, a *capias* issues under which the defendant is taken into custody: but that gives him no information, nor does it entitle him to demand an inspection of the grounds upon which the prosecution is instituted. Again, when informations are filed by the Attorney General on depositions taken under some of the excise laws, the party is not entitled to inspect those depositions. The practice on common law indictments, and on informations on particular statutes, shews it to be clear that this defendant is not entitled to inspect the evidence, on which the prosecution is founded, till the hour of trial.

GROSE, J. It is clear that neither at common law, or under any of the statutes, is the defendant entitled, as a matter of right, to have his application granted. And if we were to assume a discretionary power of granting this request, it would be dangerous in the extreme, and totally unfounded on precedent.

Rule discharged.

Ex parte CHESTER.

Monday,
May 21st.

If a bond, and warrant of attorney to confess a judgment, be given to secure an annuity, and the date of the latter be not set forth in the memorial, the Court will only set aside the latter;—but this the Court will do on motion, though no action be brought, or judgment entered up under the warrant of attorney.

CHESTER granted an annuity to one *Allison*, which was secured by a deed of assignment, a bond, and a warrant of attorney to confess judgment. No action was brought on the bond, nor was any judgment entered up under the warrant of attorney. On a former day *Mingay* obtained a rule calling on *Allison* to shew cause why the deeds should not be set aside, because the memorial did not contain the *date* of the warrant of attorney (a).

Erskine, and *Marryat*, shewed cause on two grounds; First, that the Court had no jurisdiction at all in this case, *Allison* having neither entered up judgment on the warrant, or instituted any other proceeding in the Court, and the annuity act (b) only giving jurisdiction “to the Court in which any action is brought

(a) There was also another objection on the merits, that no consideration was given for the deed of assignment, which was re-

ferred to the master.

(b) 17 G. 3. c. 26. s. 4.

§c.”; and secondly, that, if the Court could take cognizance of the question, only the warrant of attorney ought to be set aside; the annuity act (a) directing that the memorial shall contain the day of the month and the year when the deed, bond, instrument, or other assurance, bears date §c, otherwise that every such deed, bond, instrument, or other assurance, should be void. They therefore contended that only the particular deed, which was not truly set forth in the memorial, was void; and that a defect in one deed did not vitiate the others, which were truly recited in the memorial. And they said that the Court had already decided this point in the case of *Willey v. Wheeler* (b).

The Court (c) were of this opinion; observing that the word “such” in the annuity act confined the operation of that clause to the particular deed (d) which was not truly recited in the memorial. And, in answer to the first objection, they said that the warrant of attorney gave them a jurisdiction; for that it was a proceeding in the Court, and was of greater importance than the commencement of an action in the regular course, because it enabled the party to sign judgment immediately without any application to the Court (e).

Rule absolute, as to the warrant of attorney.

(a) Sect. 1.

(b) Tr. 31 G. 3. cited in page 495. for another purpose.

(c) Absent Lord *Kenyon*, Ch. J.

(d) See vide *Hopkins v. Waller*, ante 463.

(e) The Court determined the same point in *Thurkill v. Wallace*, M. 31 Geo. 3. which was also an application upon the annuity act; and there they said that independent of that

act it had been long ago settled upon much argument and deliberation that the Court has a summary jurisdiction over every warrant of attorney to enter up judgment in the Court, before any judgment has been actually entered up, and may, if they see proper, direct it to be cancelled to prevent any improper use being made of it. Vide also *Haynes v. Hare*, 1 H. Black. C. B. 662.

HOLLAND against JOHNSON.

Monday,
May 21st.

THERE were four separate affidavits by the plaintiff against four several defendants, for separate offences against the lottery act. The original writ included all the defendants, though the *ac etiam* part was several against each; and a separate *alias capias* was sued out against each.

Garrow obtained a rule to shew cause why the proceedings against this defendant should not be set aside; on the ground that one part of the process must pursue another, that an *alias capias* cannot be sued out against each of several persons, who
are

Only the defendant or defendants in one action can be included in a bailable writ: Secus, if the writ be not bailable.

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Ex parte
CHESTER.

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JOHNSON.

are all joined in one original writ; and that the original writ itself was also bad for including the four defendants, against each of whom there were separate affidavits. The original writ cannot be supported unless it be warranted by the affidavit; for the lottery act (a) requires an affidavit to be made before any process can be sued out; and it was held in *Goodwin q. t. v. Parry* (b) that four several defendants could not be included in one affidavit. The original writ therefore should have pursued the affidavit, and the *alias* the original. He also said that in a case before Lord Kenyon at his chambers, *Stephens q. t. v. Butcher*, his Lordship discharged the defendant out of custody, because the writ against him and three others was founded on four several affidavits; and added that had the application been made to the Court, the proceedings also would have been stayed.

Baldwin now shewed cause. The proceedings in this case are warranted by the general practice. In general cases four defendants may be included in one writ, it being mere process to bring them into Court, after which a separate *alias* may be sued out, and a declaration may be filed against each. And the only difference between proceedings in ordinary cases and those on the lottery act is this, that the lottery act requires a previous affidavit: but here the plaintiff complied with the requisites of the statute by making separate affidavits against the several defendants; in which respect this case differs from that of *Goodwin q. t. v. Parry*, where the proceedings were stayed merely because all the defendants were included in one affidavit. And perhaps it may not be too much to contend in this case that the original writ itself is several; for the material part of it, the *ac etiam*, is so.

Per Curiam. (After consulting with the Master,) In cases in general, the plaintiff may join four defendants, for separate causes of action, in one affidavit and one writ; and sever the subsequent proceedings against them. Then taking this to be a case not on the lottery act, it would stand thus; four persons were mentioned in the original writ, and there were separate *alias capias* against each: but the plaintiff is warranted in severing the proceedings against them. If that be so in general cases, consider whether this case, on the lottery act, differ from them. In deciding the case of *Goodwin q. t. v. Parry* we did not advert

(a) 27 Geo. 3. c. 1. s. 2.

(b) Ante 527.

to the practice in other cases. When the lottery act directed that the writ should be founded on a previous affidavit, it meant an affidavit filed according to the course and practice of the Court; and by that practice a plaintiff may join four defendants in one affidavit and one writ, and afterwards declare against them separately. And the rule was then discharged. But in the *Trinity* Term following,

BULLER, J. said, that the Master had misled the Court, with respect to the practice of joining four persons in one affidavit, for that it was holden in *Gilby v. Lockyer* (a), (which was not cited by either side when this case came before the Court) after a conference with all the judges, that only one defendant could be included in one affidavit. That it was therefore necessary to take the earliest opportunity of correcting this mistake; and that the Court had again consulted all the judges on this occasion, who were of opinion that a plaintiff could not join distinct defendants for distinct demands either in the same writ (b) or in the same affidavit. And that therefore the case of *Gilby v. Lockyer* ought to regulate the practice in future.

(a) *Dougl.* 217. last edit.

(b) In *Holland v. Richards*, Tr. 32 G. 3. *Garrow* suggested to the Court that the case of *Gilby v. Lockyer* only proved that several defendants could not be joined in one affidavit; but that so far from shewing that several defendants could not be comprehended in one writ, it admitted that they might. And that this was acknowledged in all the books of practice. But

Per Curiam. In *Holland v. Johnson* we con-

sulted all the judges upon this question, who agreed in the opinion delivered by us that several defendants for separate causes of action cannot be joined either in the same writ (+) or in the same affidavit. And this is founded on the old practice by original, which only included one Defendant: and if that writ only issued against one Defendant, the *latitat*, in which the plaintiff was permitted to add the *ac etiam*, to save expence, ought to be confined to one.

(+) In *Yardley v. Burges*, Tr. 32 Geo. 3. A rule was obtained calling on the plaintiff to shew cause why the proceedings should not be set aside because four defendants for distinct causes of action were included in one *latitat*, which was notailable; but on

shewing cause, *The Court* said that the rule laid down in *Holland v. Johnson*, and *Holland v. Richards*, only extended toailable writs; and therefore they discharged this rule.

Palmer in support of the rule. *Gibbs* contra.

DE LA PREUVE *against* The DUC DE BIRON.

Saturday,
May 21st.

THE defendant having obtained a rule to shew cause why the proceedings should not be stayed until the plaintiff, who was a foreigner, gave security for the costs;

It was now said, in answer, that the defendant was not in a situation to make this application, because he had not put in

costs, unless the defendant have put in bail.

The Court will not stay the proceedings till the plaintiff, a foreigner, give security for the

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DE LA  
PREUVE  
against  
The DUC DE  
BIRON.

bail. It seemed to be admitted that it had never been decided in any case that the defendant should put in bail previous to his applying for this rule: but

*The Court* (a) said that it would be proper and convenient if such a rule were established; and therefore, on the defendant's undertaking to put in bail, they made the

Rule absolute.

(a) Absent Lord *Kenyon*, Ch. J.

END OF EASTER TERM.



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C A S E S

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ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Thirty-Second Year of the Reign of GEORGE III.

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In this Term the Lord Chancellor resigned the Great Seal, which was on the same Day (a) given in Commission to the Lord Chief Baron EYRE, Mr. Justice ASHHURST, and Mr. Justice WILSON.

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The KING *against* The Mayor &c. of YORK.

Friday,  
June 8th.

**B**OWER moved for a *mandamus*, to be directed to the defendants, to compel them to put the corporate seal to the certificate of the election of Mr. *Withers*, as recorder, on an affidavit that he had the majority of legal votes at the election, in order that he might apply to the king for his approbation; and he prayed that it might be absolute in the first instance. Mr. *Withers* stated in his affidavit that at the election there were only 101 legal voters, 51 of whom voted for him; but that one *Brown*, who had no title, and who has since been ousted by judgment on a *quo warranto* information, was permitted to give his vote for Mr. *Sinclair*, in whose favor the mayor then gave the casting vote.

*Mandamus* granted to the mayor &c. of York to put the corporate seal to the certificate of the election of the recorder, on an affidavit that he had the majority of legal votes; though it was stated that the other candidate had the majority at the election, and that the corporation had already certified his election.

date had the majority at the election, and that the corporation had already certified

(a) June 15th.



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The Mayor  
of YORK.

*Erskine* on the part of Mr. *Sinclair*, and

*J. Heywood*, for the corporation, opposed this. They stated that Mr. *Sinclair*, having a majority of votes at the election, was declared duly elected; upon which the corporation certified his election to the secretary of state, in order that the king might approve of him. They contended that the subsequent ouster of one of *Sinclair's* voters did not destroy his election; because *Brown* was at that time in the possession of his corporate franchise; and that even if it were doubtful whether or not the judgment against *Brown* had a retrospect so as to affect his vote, given when he was a corporator, this was not the proper mode of trying the legality of Mr. *Sinclair's* election. That if the mayor &c, had not certified *Sinclair's* election, perhaps this Court would have granted a *mandamus* to compel them to do so, *Sinclair* having had the majority of votes at the election: but that now it would be absurd to grant such a rule in favor of *Withers*, because the election of *Sinclair* was complete, except as to the king's approbation, which is considered as a mere matter of form; and that if this *mandamus* were to be granted, there would be the certificate before the king of the election of two different persons. And they cited *R. v. The Mayor of Colchester* (a), where, on a similar application, the Court refused the *mandamus*; saying that Mr. *Smithies*, the person elected recorder, should be first ousted by a *quo warranto* information; and that "the consequence of granting the rule would be that a second person would be admitted to an office, which was already filled by another, both claiming to be duly elected." But

*The Court* said, that the present application was a matter of course, like a motion to swear in a corporator. That the granting of the *mandamus* would not be conclusive on Mr. *Sinclair*; for that the writ only required the corporation to do the act, or to shew cause why they do it not; and that all the arguments which could be urged in favour of *Sinclair* might be pressed, on the return to the *mandamus*, in a much more solemn manner than in the present form.

Rule absolute.

(a) *Ante* 2 vol. 259.



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HEYRICK *against* FOSTER.Friday,  
June 8th.

**T**HIS was an action of debt to recover a penalty of 20*l.* under the 25 *Geo. 3. c. 50. s. 5*; to which the defendant, under the common rule for pleading double, pleaded, 1st. the general issue; and 2dly, a prosecution and acquittal for the same offence before a justice of the peace. In the last term

The statute  
4 *Ann. c. 16.*,  
which allows  
double plead-  
ing, does not  
extend to pe-  
nal actions.

*Vaughan* obtained a rule to shew cause why the rule for pleading double should not be discharged, or why the defendant should not elect on which of the pleas he meant to rely, and to set aside the other, upon the positive words of the proviso (a) in the statute 4 *Ann. c. 16.* (which allows double pleading) "that nothing in that act before contained shall extend to any writ, bill, action, or information upon any penal statute"; and on the authority of several adjudged cases; *Morgan v. Luckup, Cas. Temp. Hardw. 262.* and 2 *Str. 1044.* *Law q. t. v. Crowther, 2 Wilf. 21*; and *Lookup v. Frederick, bart. Barn. 365.*

*Holroyd* afterwards shewed cause against it. And

*The Court* thinking the question of great importance, and observing that it did not occur to them why a defendant in a penal action, where he is more favoured than in others, should not have an opportunity of making as many defences as he has in other actions, said they would consider of the point. But, on this day,

Lord KENYON, Ch. J. said that the Court were of opinion that as the words of the proviso were peremptory, that that act should not extend to actions upon any penal statute, they could not be despened with; and that the

Rule must be made absolute.

(a) Sect. 7.

The KING *against* The Commissioners of SHOREDITCH.Wednesday,  
June 13th.

**P.** *Homan*, of *St. Leonard's Shoreditch*, appealed to the sessions held for the city of *London* against a distress made upon him by the collector of the rates made by the commissioners for paving the parish of *St. Leonard's Shoreditch*, in pursuance of an act, 8 *Geo. 3.*, entitled "An act for opening certain passages, and for paving the streets and other places, in the parish of *St. Leonard Shoreditch*, in the county of *Middlesex*, and for preventing

A person ag-  
grieved by a  
distress for  
paving rates  
under 8 *G. 3.*  
*c. 33.* may ap-  
peal either to  
the sessions  
for the city  
of *London* or  
to the sessions  
for *Middlesex*.

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ing annoyances therein", and also against several rates, on a variety of grounds. The sessions, after hearing the merits, quashed the several rates and assessments, as far as they respected *Homan*, and the said distress; and ordered the commissioners to return to *Homan* the sum of 3*l.* 18*s.* 9*d.* which had been distrained, and to pay him 100*l.* for his costs, &c.

*Shepherd* moved, in *Hilary* term last, for a *certiorari* to remove these orders. He said that the clause in this act that "no matter or thing to be done, relating to the execution of the act, should be removed by *certiorari*," only applied to matters warranted by the act, and did not extend to this case, where it appeared upon the face of these proceedings that the sessions in *London* had no jurisdiction. This rule was opposed, in the same term, on the ground that the sessions in *London* had jurisdiction by the positive words of the act. The rule was however made absolute; it being understood that the question respecting the legality of granting the *certiorari* should be discussed when the order should be returned. That order having been since returned by the *certiorari*;

*Erskine*, *Mingay*, *Garrow*, and *Sellon*, now renewed their objection to the *certiorari*. By one of the clauses of this act it is enacted "that if any person shall think himself aggrieved by any thing done in pursuance of the act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices &c, at any general or quarter sessions of the peace to be held for the county of *Middlesex* or city of *London*, within three months &c.; such appellant giving notice &c, and entering into a recognizance before some justice of the peace for such county or city to pay costs &c; and the determination of such sessions shall be final, binding, and conclusive, to all intents and purposes." This, they insisted, gave an option to the party to appeal either to the one sessions or the other; which was decisive of this question. That the reason of it was obvious, namely, to avoid an appeal from the same persons to the same; most of the commissioners under the act being justices of the county of *Middlesex*, and acting at those sessions. And that if the sessions in *London* had jurisdiction over the appeal, the *certiorari* was taken away in express terms.

*Bearcroft* and *Shepherd*, *contra*, contended that the *certiorari* was properly issued in this case, it appearing upon the order itself that the sessions in *London* had no jurisdiction. The appeal given in the alternative means either to the *London* or *Middlesex* sessions,



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sessions, as the case may happen; *reddendo singula singulis*; for matters arising in *London* the appeal is given to the sessions in *London*, and for those in *Middlesex* the appeal must be to those sessions. Although there is no property, which is affected by this act, locally situated in *London* (a), there are cases pointed out in the act, to which the right of appealing to the *London* sessions may apply; for instance, where an officer receiving money removes to another county, without accounting (b); so where persons, liable to pay the rates, remove to any other place, in order to avoid a distress (c). And if any case, to which the right of appealing to the *London* sessions, may happen, it is sufficient to satisfy the words of the act. But, secondly, even if the sessions in *London* could entertain any appeal against acts done in the county of *Middlesex*, it appears that they have exceeded their jurisdiction in this instance, because this is an appeal, not only against the rates, but also against the distress. By the act no appeal lies against the distress. But an action is thereby given (d) to recover damages, in which the officer is to have an opportunity of tendering amends, and is entitled to treble costs if the jury think that the amends tendered are sufficient; whereas if an appeal be lodged, the officer has no opportunity of tendering amends, and he may be sentenced, as in this case, to pay costs. Then if the appellant in this case could have brought an action by virtue of this act against the officer who distrained, the distress was not the subject of an appeal; for an appeal is only given against those acts "for which no particular method of relief is thereby appointed."

Lord KENYON, Ch. J. An appeal against an act done in a particular district being generally confined to the sessions acting

(a) Which was admitted in answer to a question from the Court.

(b) By one of the clauses the commissioners are authorised to appoint certain officers, who are to account upon oath; and if the latter refuse to account, any justice of the peace for the county or place, wherein such officer, so neglecting, shall be and reside, may enquire &c; and levy the balance by sale and distress.

(c) This clause, after pointing out the mode of recovering the rates, enables two justices of the peace for the county or place, where persons liable to pay the rates may be

found, to commit them for one month, or until payment of the rates.

(d) By that section it was enacted that where any distress should be made for any sum &c, to be levied by virtue of the act, the party making the same should not be deemed a trespasser on account of any default or want of form &c, nor should the party distraining be deemed a trespasser *ab initio* on account of any irregularity, which should be afterwards done by the party distraining, but that the person aggrieved by such irregularity might recover full satisfaction for the special damage in an action on the case; in which the officer might tender amends &c.



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for that district, the leaning of our minds would naturally induce us to support such a construction in this case, if the words of this statute would bear it. But as in this case the Legislature have chosen to give an appeal beyond the jurisdiction of the justices acting in one county, we cannot control it. And this is not a singular instance in the statute book, in which questions arising within the local limits of one county are directed to be tried in another; for instance, the case of wrecks (a). If we could have found any words in this act of parliament, which would have enabled us to apply the rule, *reddendo singula singulis*, we should readily have adopted it. But, after looking through all the provisions of the act, we find that every thing, which the act directs, is to be done in the county of *Middlesex*. Why then did the Legislature, in framing the clause respecting appeals, depart from the language used in all the preceding parts of the act, unless they intended to discriminate between the case of appeals and all other cases? And this clause expressly gives an appeal to the party grieved, either to the sessions for the city of *London*, or the county of *Middlesex*; and in directing what shall be done previous to the appeal, the words "city of *London* or county of *Middlesex*" are again used. The Legislature therefore having given in express terms an option to the party to appeal to the sessions either in *London* or *Middlesex*, we are bound by it. But it is said that the justices have, at all events, exceeded their jurisdiction, because no appeal would lie in this case; an appeal being confined to those cases where the party aggrieved has no other remedy, and the party in this case having another remedy by action for the distress. But the act of parliament does not give the action: if there be any excess of jurisdiction, the common law gives the remedy; and all that the act does, in this respect, is, the restraining of the common law, by saying that an action shall not be maintained for all irregularities, and that, if an action be brought, the officer acting under the statute shall be entitled to certain privileges. But for such a grievance as the present the act has given an appeal, if the party choose, without being entangled in the forms of an action. Then the *certiorari* being taken away by a subsequent substantive clause, which operates on all cases in which the justices act within their jurisdiction, and it not appearing on the face of these proceedings that the justices have exceeded their jurisdiction, I think that the *certiorari* ought to be quashed, *quia improvidè emanavit*.

(a) Vide 26 Geo. 2. c. 19. s. 8.



BULLER, J. (a) In order to let in the rule, *reddendo singula singulis*, it was incumbent on those, who disputed the jurisdiction of the city of *London* in this case, to shew that some part of the property, on which this statute attaches, is locally situate within the city of *London*, and some within the county of *Middlesex*. But it is now admitted that the whole lies within the latter; and so indeed it appears from the title of the act. In considering how far that argument ought to prevail, it is necessary to advert to the case of a receiver, who will not account, and who removes to a third county: if there had been no provision in the act for such a case, then there would be some weight in the argument; but the Legislature have provided for that case, by enabling justices in the county where the party may reside, to grant a warrant of distress; and they have said that in cases, where no particular provision is made, the party may appeal to the sessions either in *London* or *Middlesex*. And if there be any one instance, in which the party has an option to appeal to either of those sessions, which must be admitted to exist in the instance I have put of the receiver going into a third county, it destroys the argument, *reddendo singula singulis*. For according to that argument no appeal could be had to the sessions in *London* except for acts done within the jurisdiction of the city of *London*, or to the *Middlesex* sessions but for acts done in the county of *Middlesex*. It seems to me therefore that the true construction of this clause is that the party has an option in all cases to appeal either to the *London* or the *Middlesex* sessions.

GROSE, J. No clause in this act of parliament affects to extend to any district out of the county of *Middlesex*. Then the act, having expressly mentioned certain places in *Middlesex*, gives an appeal, either to the sessions for the county of *Middlesex* or for the city of *London*. Now if no appeal will lie at the *London* sessions, the latter words are perfectly nugatory. It has been asked, however, for what purpose should an appeal be given in *London* against an act done in *Middlesex*? In answer to that, many cases might be put where such a provision would be very salutary; and where it would be more satisfactory to the party aggrieved to appeal to a set of magistrates living out of the local limits of the jurisdiction where the act complained of is done. At all events it is sufficient for us, in construing this act of parliament, to say that the Legislature have in express terms given the party an option to appeal either to the *Middlesex* or *London*

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(a) Abf. Ashurst, J.

sessions;



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sessions; and under that clause the sessions in *London* had jurisdiction in this case.

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missioners of  
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*Per Curiam,*

Let the *certiorari* be quashed.

Doo and Another *against* BRABANT and Another.

*A.* bequeathed money to trustees in trust for *B.* till she should attain twenty-one, and then to pay the same to her, and if *B.* should die under twenty-one leaving a child or children, then in trust for such child or children; but if *B.* should die under twenty-one without leaving any child or children, then in trust for *C.*'s three nieces. *B.* attained twenty-one, married, had two children, and died in the life of the testatrix: *B.*'s children took nothing by the will.

THIS case was sent here by the direction of the Lord Chancellor. And the question arose on the will of *S. Counsell*, who gave certain money in the funds to trustees in trust for *S. Counsell*, daughter and only child of her late husband deceased, then of the age of twelve years, until she should attain twenty-one, and when and so soon as she should attain that age then upon trust to pay and transfer the same to *S. Counsell*, her executors &c, to and for their own use and benefit; and in case *S. Counsell* should die under twenty-one, leaving any child or children of her body lawfully begotten, then in trust for all and every such child and children who should live to attain his or their age or ages of twenty-one, and to be equally divided between them. But in case *S. Counsell* should die under twenty-one without leaving any child or children, or being such, they should all die under twenty-one, then in trust for her three nieces, *Mary*, *Ruth*, and *Sarah*, *Ogle*. *S. Counsell* the daughter married *B. Doo*, attained the age of twenty-one, and had two children living at the time of her death, which happened in the life-time of the testatrix. The two children of *S. Counsell* the younger were the plaintiffs in the suit, and *Ruth* (formerly *Ruth Ogle*), the survivor of the three nieces of the testatrix, and her husband, were the defendants. *Ruth Brabant* is the next of kin of the testatrix. The question was, whether the plaintiffs took any and what estate under the will of *S. Counsell*.

*Shepherd* (a), for the plaintiffs, argued that the children were entitled under the will. It was undoubtedly the intention of the testatrix that her grand-children should take before her nieces. The three objects of her bounty were, 1st, her daughter; 2dly, her grand-children; and 3dly, her nieces; the last of whom were not to take while her daughter or her grand-children were alive. *S. Counsell*'s dying under twenty-one was not a condition precedent to her children taking; the bequest to her was a conditional limitation. And if an estate be given on a conditional limitation, and there be a limitation over, and the

(a) This case and the next were argued | not sent till the present.  
in *Easter Term*, but the certificates were |



first fail on any account, the last shall take place, *Moor*, 486; *Avelyn v. Ward*, 1 *Vez.* 422. Nay, words of condition may be taken as words of limitation, where there is a remainder over. *Andrews v. Fulham*, 2 *Str.* 1093; *Jones v. Westcomb*, 1 *Eq. Cas. Abr.* 245. pl. 10. *Gulliver v. Wicket*, 1 *Wils.* 105; on the same will. In *Strange* the case is thus stated; a bequest of leasehold premises "to my wife for life, remainder to such child as she is now supposed to be *enfeint* with, and to the heirs of such child for ever; provided that if such child as shall happen to be born shall die before twenty-one, having no issue, the reversion of one third shall go to my wife and her heirs, one third to my sister *Elizabeth* and her heirs, and the remaining one third to my sister *Anne* and her heirs." His wife was not *enfeint*; and the objection was that as there was no such child, those who claimed in remainder on the dying of such person under twenty-one, and without issue, could never enjoy the estate. But the Court said that the limitation over should take place; and that "it is no unusual thing for words of condition to be taken as words of limitation, where there is a remainder over." The case of *Statbam v. Bell*, *Cowp.* 40. is to the same effect. In *Willing v. Baine* (a), *A.* gave 100*l.* to each of his children, payable at twenty-one, and if any of them died before twenty-one then his legacy was to go to the survivors; one died in the testator's life-time; and it was held, that though the legacy was lapsed as to the legatee dying under twenty-one, yet it was well given over to the survivors. Many other cases shew that where there is a devise to *A.*, remainder to *B.*, and *A.* die in the devisor's life-time, *B.* shall take. The case of *Gough Calthorpe v. Gough* (b), which was

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relied

(a) 3 *Pr. Wms.* 113.(b) *GOUGH CALTHORPE v. GOUGH* and others—*At the Rolls*, 17th and 18th February, 1789.

Sir *Henry Calthorpe*, by his will dated 27th February, 1741, directed that 10,000*l.* part of his personal estate should be placed out by his executors, in their own names, in some of the public funds, to the use and intent that they should pay the interest thereof, during the joint lives of Sir *Henry Gough* and dame *Barbara* his wife, into the proper hands of the said dame *Barbara*, or as she alone should by writing appoint, the same being intended to be at her sole use and disposal, and in case she should die in the life-time of her husband, to the intent that they should pay the said 10,000*l.*, or any part there-

of, in such manner, and to such persons as the said dame *Barbara* should, by writing attested by two witnesses, appoint, and for want of such appointment, to pay the same unto and amongst all the children of the said dame *Barbara*, who should be then living, equally; and if no such children should be then living, to pay the same to such person as should be then in possession of the testator's real estate, by virtue of his will; but if the said dame *Barbara* should survive the said Sir *Henry*, her husband, then the said executors should, after the death of the said Sir *Henry*, pay the whole sum of 10,000*l.* to the said dame *Barbara*, to her own use. And the testator directed that all the residue of his personal estate should be laid



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relied on by the defendants in the court of Chancery, is distinguishable from the cases now cited; because there was no limitation

out in the purchase of land, and settled to the uses therein mentioned. On the 7th March, 1745—6, the testator made a codicil in his own hand writing, by which he appointed another executor and trustee, "to see and cause to be paid, at equal payments, the legacy to his sister lady Gough;" and afterwards followed these words, "in case my sister's children do not live to their several ages of 21 years, the legacy left to her is to revert to my heir at law."

Lady Gough survived Sir Henry her husband, but died in the life time of the testator, leaving the plaintiff and also the defendants Richard Thomas Gough, John Calthorpe Gough, Elizabeth Gough, and Barbara, the wife of Isaac Spooner, and lady Palmer, the wife of the defendant, Sir John Palmer, her surviving; lady Palmer died afterwards in the life-time of the testator; and the testator who became a lunatic in the year 1747, and continued so till his death, died 14th April, 1788. The plaintiff, Sir Henry Gough Calthorpe, filed his bill, praying that the residue of the testator's personal estate, which was directed to be laid out in land, and to be settled on himself in tail, with remainder to the defendant Richard Thomas Gough in tail, with remainder to the defendant John Calthorpe Gough in tail, with remainder to the plaintiff in fee, might be paid to him; and that it might be declared that the legacy of 10,000*l.* was lapsed.

Mitford and Trower insisted that Lady Gough having survived her husband, the legacy became immediately absolute to her, and all the former directions as to the 10,000*l.* were at an end; and as she afterwards died in the life-time of the testator, the legacy was lapsed. That it was clear this was the intention of the testator; for if lady Gough had been a widow at the time the will was made, the testator would have given her the legacy absolutely, and would have made no mention of her children.

Lloyd and Romilly, for the defendants, contended that they, together with the plaintiff, were intitled to this legacy of 10,000*l.* equally; that it appeared to be the intention

of the testator, if Lady Gough should make no appointment, and should, for any reason, be incapable of taking the legacy herself, it should go amongst all her children; and that in the event which had happened, no appointment had been made, and Lady Gough could not take the legacy. They cited *Jones and Westcomb*, 1 Eq. Ca. Abr. 245. and *Statham and Bell*, Cowper 40. In the last of those cases a testator, reciting that his wife was then pregnant, declared that if she brought forth a son he should inherit his estate at 21, if a daughter, he gave one moiety to his wife, and the other to his two daughters equally, at 21; if either died before that time, the survivor to have her share; if both died, he gave his estate to his wife and her heirs. The testator's wife was not with child, and the only daughter of the testator died an infant. The Court held that the wife was intitled to the estate, because it was the plain intention of the testator, that if no son should be born, and she should have no daughter live to attain 21, the wife should have the whole estate. And so in the present case it appeared to be the plain intention of the testator if Lady Gough could not take the legacy, and should not appoint to whom it should be paid, that it should go to her children; and that the codicil shewed this intention more clearly, for the testator there mentioned the event in which (and it is to be presumed in which only) the legacy was to go to the person intitled to the personal estate (*viz.*) their dying before they attained 21 years.

Master of the Rolls (†).—This is an absolute legacy to Lady Gough, qualified on account of her situation as a married woman. If she died in the life-time of her husband, she had a power of disposing of it; and if she did not so dispose of it, it was to go to her children: if she survived her husband she was to have it absolutely. There was no event in which the children could take any thing, which it was not in her power to deprive them of. The testator presumed (as every testator does) that the persons who were to take under his will, would survive him. If the testator had foreseen the event which has

(†) Sir R. P. Arden.



limitation over after Dame *Barbara's* death. The Courts have even gone so far as to supply words in a will, where the intention was clear. *Fonnereau v. Fonnereau*, 3 *Atk.* 315. In *White v. Barber* (a), under a devise in trust for such child or children as the devisor's wife should be enient with at his death, it was held that sons born in his life-time should take: in that case this Court in their certificate acknowledged that there *was a defect of expression* in the will, but supplied the necessary words. And in *Doe d. Watson v. Shippard* (b) the Court would not supply the words supposed to be omitted, because the intent was not clear: but Lord *Mansfield* expressly said "The Court might supply the omission of express words, if they found a plain intent." Now in this case it is clear that the testatrix meant that her grandchildren should take before her nieces; and therefore the Court may supply the necessary words.

*Ghambre, contra*, was stopped by the Court.

LORD KENYON, Ch. J. Nothing can be more clear than the words of this will. The devise is to *S. Counsell* when she shall attain the age of 21, and if she shall die under twenty-one leaving children then to those children; but she did not die under that age, and therefore nothing can pass to the grandchildren. If this event had occurred to the testatrix, most probably she would have provided for it, and given the money to the grandchildren: but as she has not done so, we cannot make a will for her. This is distinguishable from the cases cited; for here nothing was given to the grandchildren but upon an event which did not happen.

ASHHURST, J. of the same opinion.

happened, he probably would have provided for it: but that consideration ought not to influence my judgment, for the same observation will apply to all cases of lapsed legacies. As to the codicil, I cannot see that it makes any difference: Lady *Gough* would have taken the legacy just in the same manner under the codicil, as if it had remained upon the will alone.

His Honour did not decree the personal

estate to be paid to the plaintiff, altho' both the defendants who had remainders in tail consented to it (†), but referred it to the Master to inquire what were the limitations of the estates to be purchased with the money, and whether any person besides the defendants had any interest in it (§).

(a) 5 *Burr.* 2703.

(b) *Dougl.* 75. 3d edit.

(†) *Vid. Trafford v. Boehm*, 3 *Atk.* 447.

(§) The will in this case was not proved by witnesses; and it was said at the bar that it was not necessary that it should be proved, it being above 30 years old; and the counsel mentioned a case of *Mackery* and *Newbolt*, in which Sir *Lloyd Kenyon*, Master

of the *Rolls*, decided that a will above 30 years old should be read without proof, although the testator had died very recently. That point however was not decided in this case; because Sir *H. G. Calthorpe*, who was the heir at law, admitted the will, and claimed under it.

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BRABANT.

BULLER, J. The testatrix intended to give the whole to S. Counsell, if she attained the age of twenty-one, and the children nothing; she did attain that age, and therefore nothing was intended to be given to the children in that event. There is a distinction in some of the cases, *Willing v. Baine*, and a case there referred to, between words giving a remainder over, and an original devise: in those cases the devise was good, not as a remainder over, but as an original devise: but here was no original devise to the grand-children but on an event which did not happen.

GROSE, J. The event, which has happened, was not foreseen, and therefore not provided for.

Lord KENYON then said, that the form of the case must be altered, as in *Sabbarton v. Sabbarton (a)*, before the Court could certify to the Lord Chancellor; for, that as it now stood, of a limitation of money, they could not take judicial notice of it.

The case having been since altered accordingly, in which it is stated as a limitation of a term of years, the following certificate was sent by this Court;

"We have heard Counsel, and considered this case; and are of opinion that the plaintiffs took no estate whatever in the said leasehold premises by virtue of and under the said will of the said *Sarah Counsell*; the events upon which the limitation, under which they claim, was to take place, not having happened."

9th June 1792.

Kenyon,  
W. H. Ashburst,  
F. Buller,  
N. Grose.

(a) *Cas. Temp. Talb.* 245. See also *Porter v. Bradley*, ante 3 vol. 146.

HENRIETTA MARIA ATHERTON, ELIZABETH ATHERTON, and HESTER ATHERTON, against B. PYE, and ELIZABETH his Wife, P. LEGH, and W. MAIRE.

A. devised  
"to all and  
every the  
daughter and  
daughters of

the body of B., and the heirs male of the body of such daughter or daughters equally between them, if more than one, as tenants in common, and for default of sub issue, he devised all his said lands to C;" held that the daughters of B. took cross remainders.

THIS case was sent here from the court of Chancery. *T. Benet*, being seised in fee, devised all his manors, lands, &c, in the counties of Wilts, Yorkshire, Southampton, and elsewhere,

see 5. Durnf. & East 427. 1510. & vol. A. p. 716.  
Ambl. 663. 1. 9arts Rep. 229. 416. & 2. East  
Rep. 36.



elsewhere, to his daughter *Martha*, the wife of *P. Legh*, for life, remainder to his grandson *Benet Legh*, son of *M. Legh*, for life, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of his grandson lawfully to be begotten, and for default of such issue to the second, third, and other, son and sons of his daughter *Martha*, severally and successively, and to the several and respective heirs male of the several and respective bodies of such son and sons &c; and in default of such issue to "all and every the daughter and daughters of the body of his daughter *Martha*, and the heirs male of the body of such daughter or daughters, equally between them, if more than one, as tenants in common, and not as joint-tenants, and for and in default of such issue, he gave and devised all his said premises unto his right heirs for ever." The deviser died leaving his daughter *Martha* his only child, his heiress at law. *P. Legh*, and *Martha* his wife, had issue four children (*viz.*) the said *Benet Legh*, *Henrietta Maria*, *Elizabeth*, and *Hester Legh*. *B. Legh* died in the life-time of his mother an infant, and unmarried, leaving his three sisters his co-heiresses at law. *Elizabeth Legh* married *J. A. Keck*, Esq. who is long since dead, leaving *Elizabeth* his wife surviving, and who is now the wife of the defendant *Bathurst Pye*. *Henrietta Maria Legh* married *Robert Vernon Atherton Gwillym*, afterwards called *Robert Vernon Atherton Atherton*, and they had issue seven children (*viz.*) *Atherton Legh Atherton*, the three plaintiffs, and three others who died in the life-time of their parents infants, and unmarried. *Henrietta Maria Atherton* the mother died in September 1779, in the life-time of *Robert Vernon Atherton Atherton* her husband; and she at her death left *Atherton Legh Atherton* her only son and heir at law, and the complainants her only younger children. *Robert Vernon Atherton Atherton* died in July 1783. *Martha* the wife of *Peter Legh*, the deviser's daughter, and the first tenant for life under his will, died 21st June 1787. In Michaelmas Term 1787 *Hester Legh* suffered recoveries of her third of the estates limited to her by her grandfather's will, and of which she entered into possession upon the death of her mother *Martha*; and by deeds duly executed declared the uses of the recoveries to herself in fee. *Atherton Legh Atherton*, the son of *Henrietta Maria*, one of the deviser's grand-daughters, died an infant in March 1789, and unmarried; on whose death there became a total failure of issue male of *Henrietta Maria*, and he left the plaintiffs his only sisters and co-heiresses at law; and they as such thereupon be-

1792.

ATHERTON  
against  
PYE.



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against  
PYE.

came, together with *Hester Legh* and *Elizabeth* now the wife of the defendant *Bathurst Pye*, (the two surviving daughters of *Martha Legh*) the co-heiresses at law of the devisor. *Hester Legh* died on the 8th of July 1789 unmarried, and without issue, leaving *Elizabeth Keck*, now *Elizabeth Pye*, her surviving sister, together with the plaintiffs, her nieces, her co-heiresses at law, and who are now become the co-heiresses at law of the devisor.

The question was whether the plaintiffs upon the death of *Atherton Legh Atherton*, their brother, took any and what estate or interest under or by virtue of the will of *T. Benet*, the devisor, their great-grandfather, in the estates devised by his will, as three of the co-heiresses at law of the said devisor, or in any other manner?

*Wood*, for the plaintiffs, stated the question to be whether cross-remainders could be raised in the devise to the grand-daughters of the devisor, and he argued in the negative. No cross remainders can be raised but by express words or necessary implication. *Comber v. Hill*, 2 Str. 969. In *Pery v. White* (a) the rule respecting cross remainders by implication is clearly laid down, "that wherever cross remainders are to be raised between two, and no more, the presumption is in favour of cross remainders; where they are to be raised between more than two, the presumption is against cross remainders; though that presumption may be answered by circumstances of plain and manifest intention." Now here, if they be implied, they must be implied between more than two. And the intention of the devisor will be defeated by raising cross remainders; for he expressly devised to the grand-daughters as tenants in common, and not as joint-tenants, which is a severance of the title. If the limitations had been "to all and every the daughter and daughters, &c, and the heirs male of their respective bodies equally &c," no cross remainders could have been implied: and the words here used mean the same thing, "to all and every the daughter and daughters &c, and the heirs male of the body of such daughter or daughters &c." The intention seems to have been to make distinct limitations to each of them.

Lord KENYON, Ch. J. (stopping *Chambre contrà*). Although the cases (b) upon this subject run extremely near to each other,

(a) *Cowp.* 780.

(b) Vid. *Holmes v. Meynel*, Poll. 425.  
Sir T. Jon. 172. Sir T. Raym. 452. *Skin.*  
17. and 4 Leon. 14. *Comber v. Hill*, Str.

969. *Williams v. Browne*, Str. 996. *Wright*  
*v. Holford*, *Cowp.* 31. and *Pbigard v. Mans-*  
*field*, *Cowp.* 797.



many of them are so like the present that they must decide it. It is true that as between two only it shall be presumed that cross remainders were intended to be raised: but if there be more than two, it is necessary to resort to other words in the will to discover an intention to raise cross remainders. But here there is no doubt, from the words of the limitation over, but that the deviser intended to raise cross remainders between the grand-daughters. The devise is "to all and every the daughter and daughters of the body of my daughter *Martha*, and the heirs male of the body of such daughter or daughters, equally between them, if more than one, as tenants in common, and not as joint tenants; and for and in default of *such* issue (namely, the daughter or daughters) then I give and devise *all* my said premises unto my right heirs for ever." He clearly intended therefore that the *whole* (a) should go together; whereas if no cross-remainders be raised between the grand-daughters, it would go to the right heirs by separate portions on the death of each grand-daughter.

BULLER, J. This is a stronger case for raising cross-remainders than that of *Phippard v. Mansfield* (b); for here besides the words "for default of *such* issue," namely, issue of all of them, the devise over is of *all* the deviser's estates: now they cannot all go together but by making cross-remainders between the grand-daughters.

The following certificate was sent to the court of Chancery;

"We are of opinion that upon the death of *Benet Legh*, and his mother *Martha Legh*, the daughters of the said *Martha* took under the will of *Thomas Benet*, the testator, estates in tail male, with cross-remainders; and consequently that the plaintiffs, upon the death of *Atherton Legh Atherton*, took no estate or interest under or by virtue of the said will of the said *Thomas Benet*."

13th June 1792. (c)

Kenyon,  
W. H. Ashburst,  
F. Buller,  
N. Grose.

(a) *Holmes v. Mynel*, Sir T. Raym. 452. | (b) *Cowp.* 797.  
Sir T. Jon. 172.; 4 *Leon.* 14.; and 2 *Sira.* 970. | (c) *Vid. ante* 706. n. a.

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ATHERTON  
against  
Pyl.



1792.

Wednesday,  
June 13th.Howis *against* Wiggins.

If the payee of a promissory note pay the amount of it to an indorsee after the bankruptcy of the maker, he may recover against the maker, notwithstanding his bankruptcy and certificate.

THE plaintiff, who was payee and indorser of two promissory notes, brought this action against the defendant as maker; who pleaded, *inter alia*, his bankruptcy and certificate in bar. It appeared that these notes had been delivered by the defendant before his bankruptcy to one *Green* with the indorsement of *Howis* upon them. After the bankruptcy *Green* sued *Howis* as indorser, and recovered against him; who now brought this action. On this evidence Lord *Kenyon* was of opinion at the trial that the certificate was no bar; and a verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit if the Court should be of a different opinion; which motion was now made by

*Russell*; who contended that this debt existed before the bankruptcy, and consequently was barred by the certificate. The money being paid by the plaintiff *after* the bankruptcy makes no difference; the debt existed before, on account of the liability. As in the case of the surety (a), who became bound with his principal for payment of money by instalments, and took a bond from him conditioned for the payment of the amount of the instalments, before the first of them became due. The principal becoming a bankrupt before that time, and obtaining his certificate, the surety was held to be thereby barred, though he had not paid the money to the original obligee till after the bankruptcy, and consequently had not been damnified till that time. This very point however appears to have been already decided; first in the case *Ex parte Maydwell* (b), where an acceptor of a bill of exchange, whose acceptance was not due, and who did not pay, till after the bankruptcies of the drawer and of another person who had given a note to *Maydwell* by way of collateral security, was permitted to prove under the commission against the surety, although that note had not become due till after his bankruptcy. There too, it might have been urged that, as the money was not paid, the debt was not due, before the bankruptcy; yet inasmuch as the acceptor was liable to pay the money upon an obligation entered into before the bankruptcy, it was held proveable as a debt under the commission.

(a) *Toussaint and Others v. Martinnant*, ante 2 vol. 100. | (b) *Cook's Bank. L.* 204. 2d. edit.



This case is still stronger than that, for the plaintiff being payee as well as indorser of the note, it necessarily presupposes an existing debt before the bankruptcy. Then came the case of *Brymer* (a), which was twice argued before the Chancellor, and not only confirms the determination in the former case as far as it goes, but is a complete answer to the only remaining objection which could be urged, namely, that these notes were not in the plaintiff's hands at the time of the bankruptcy. For in that case of *Brymer* the indorser of a bill who was obliged to pay it after the bankruptcy of the acceptor, as the indorser did here after the bankruptcy of the maker, was permitted to come in under his commission. Now the acceptor of a bill of exchange and the maker of a promissory note have ever been considered as standing in the same situation in point of law. And in reason the two cases are precisely the same with respect to this point. But

*The Court* said that this was distinguishable from the cases cited, because here the plaintiff had no legal security for a debt which he could have proved at the time of the bankruptcy, but that the property in the bill then belonged to another person; and that his subsequent act of paying the amount of the note to the indorsee was not referable to any time antecedent to the bankruptcy, so as to enable him to prove the debt under the commission. But that, when the plaintiff paid the bill, a new cause of action arose against the drawer; for at the time of the bankruptcy this plaintiff had no demand against the bankrupt. That the plaintiff could not have been the petitioning creditor, because he had not paid the money at the time of the bankruptcy. And that in *Vanderbeyden v. De Paiba* (b), where *A.* accepted a bill drawn on him by *B.* which *B.* promised to pay and gave *A.* a note to save him harmless, and *B.* became a bankrupt before the bill became due, it was held that *A.* who was afterwards obliged to pay the bill could not come in under *B.*'s commission (c).

Rule refused.

(a) *Cook's Bank. L.* 214. 2d, edit.

(b) 3 *Wils.* 528.

(c) See also *Chilton v. Whiffin*, 3 *Wils.* 13.

*Goddard v. Vanderbeyden*, *ib.* 262.; and *Ex parte Alney*, *Cowp.* 460.



1792.

Thursday,  
June 14th.

## In the Matter of BRYANT.

The clerk  
of the papers  
in the King's  
Bench prison  
cannot act by  
deputy, but  
must himself  
reside within  
the prison.

THIS rule called on Mr. *Bryant* to shew cause why he should not be removed from his office of clerk of the papers within the King's Bench prison. The application was made on two grounds; first that he had not personally resided within the walls or the rules of the prison since the month of *March* last; and secondly that the duties of the office had not been properly discharged by his deputy since that time.

*Erskine* now shewed cause against this rule, and produced an affidavit answering the facts of the second ground, but contended, on the first, that according to the construction of the statute 27 *Geo. 2. c. 17*, Mr. *Bryant* was not bound to reside within the walls of the prison; for that the statute had made a distinction between the Marshal and the inferior officers of the prison, by enacting (a) "that the marshal should hold his office so long as he should behave himself well in his office, *and be resident in the prison, or within the rules thereof*, and no longer"; and "that all inferior officers should hold their several offices so long as they should respectively behave themselves well therein, and no longer (b)." And he stated that in point of fact this office had been usually executed by deputy.

Lord KENYON, Ch. J. I am very clearly of opinion that this officer must reside within the prison; even without the assistance of the act of parliament, which indeed requires the same thing. It is incident to every public office that the party should be in a situation to discharge the duties of it. I am also of opinion that he cannot act by deputy. But as this officer appears to have acted under a mistake, I think it would be too harsh a proceeding to remove him now for non-residence. But I desire it may be understood that he must immediately reside on the spot, so as to be capable of discharging the duties of his office.

Rule discharged.

(a) Sect. 5.

(b) Sect. 7.



1792.

GRIMSTEAD *against* MARLOWE.Friday,  
June 15th.

**T**O trespass for breaking and entering the plaintiff's close, in *Leatherhead*, the defendant pleaded that the *locus in quo* was part of a certain ancient common field called the *Common Meadow*; and then justified under this custom "that every inhabitant occupying, residing, and dwelling in, any ancient messuage or tenement, within the parish of *Leatherhead*, for the time being, from time whereof &c, hath been used and accustomed to have common of pasture in and throughout the said common meadow, whereof the said close &c, is parcel, for all his horses and cows *levant and couchant* upon such ancient messuage or tenement with the appurtenances (for a certain part of the year, mentioning it), as to the said messuage or tenement with the appurtenances belonging and appertaining" &c. The right was claimed in another plea by a custom for "every occupier of a messuage or land within the parish of *Leatherhead*" &c. To these pleas there was a general demurrer.

A custom to take a profit in *alieno solo* is bad; such a right can only be claimed by prescription.

*Gregg*, in support of the demurrer, was stopped by the Court.

*Palmer, contra*, relied on the case of *Bean v. Bloom* (a), where it was held that a right to take a profit in *alieno solo* might be claimed either by custom or prescription. He said he was aware that that case arose on a demurrer to a declaration, and that there was a difference between stating such a right in a declaration and a plea; that in the former a greater latitude was allowed, that the plaintiff might state his right generally and declare upon his possession against a wrong-doer, but that in a plea it was necessary to set out a strict legal title; and that therefore in that case the plaintiff might have contented himself with stating that he was in possession; but observed that he did not rely on that, but chose to state his right on the record, and that on that right, so set forth, the opinion of the Court proceeded. That, if such a right as the plaintiff there claimed could not exist in law, the Court were bound to decide against him; whereas they held that the plaintiff might claim as an occupier a right to cut turves in *alieno solo*, by custom, though inhabitants could not. That *Gateward's* case (b), which is the leading case on this subject, did not affect the present; because there the right was claimed by *inhabitants*. So also in *Weekley v.*

(a) 2 Bl. Rep. 926. 3 Wils. 456. S. C.

(b) 6 Rep. 59, b.



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1792.

GRIMSTEAD  
against  
MARLOWE.

*Wildman* (a), it was claimed by *inhabitants* generally; and in *Selby v. Robinson* (b) by *poor and indigent householders*; which was held too uncertain a description of persons. He said that this case was distinguishable from that of *Hardy v. Hollyday* (c) mentioned by *Buller, J.* in the last term; because there the custom was claimed by tenants and *inhabitants*; which, according to *Gateward's* case, could not be supported.

LORD KENYON, Ch. J. From the time of *Gateward's* case to the present moment it has been considered as clear and established law that such a right as the present cannot be claimed by custom. The difference between claiming such a right in a declaration and a plea is also well established. In the former the plaintiff is permitted to declare generally on his possession; in the latter a legal title must be set forth. But it is to be remembered that we are now called upon to decide on a strict legal title, as set forth in a plea; and the right, which is claimed is to take a profit in *alieno solo*; but that, according to *Gateward's* case, and the case of *Hardy v. Hollyday*, cannot be claimed by custom. There may be a custom for an easement, as a right of way, in *alieno solo*; but for a profit à *prendre* the party must prescribe in a *que estate*.

ASHHURST, J. When a plaintiff in possession brings an action on the case against a wrong-doer, it is sufficient to declare against him generally, without disclosing any title. But where it becomes necessary to justify under a right in a plea, such right must be set out formally. And I have always understood it to be clear that a defendant cannot plead such a right as the present under a custom; but that he must prescribe in a *que estate* for a profit à *prendre*.

BULLER, J. again read the following note of *Hardy v. Hollyday*, which he said was one of Lord Ch. J. King's manuscripts.

"Replevin of cattle. Avowry for damage feasant. The plaintiff in bar of the avowry saith that the place in question, called *Staines Croft*, is a certain piece of land, containing &c. at *Cambridge &c.*; that *W. Hardy* was a tenant and inhabitant of and in a certain ancient messuage in *Cambridge &c.*; that *Cambridge* is an ancient borough, and there is a certain ancient laudable custom, from time whereof &c, that every *tenant and inhabitant*

(a) 1 *Ld. Raym.* 405,

(b) *Ante* 2 vol. 758.

(c) This case of *Grimstead v. Marlowe* was to have been argued in the last term: but when it was called on, Mr. Justice Buller

read a note of *Hardy v. Hollyday* E. 5 G. 3. C. B. of which the defendant's counsel was not before apprised; and therefore this case stood over till this term.



of and in any messuage within the said borough has had and been used and accustomed to have and ought &c, common of pasture for all cows &c, *levant and couchant*, from the first of *August* to the 24th day of *August* in every year &c; and that the plaintiff being *a tenant and inhabitant* &c put in the cattle distrained &c. Demurrer, assigning for cause that the plaintiff should have *prescribed* that he and all those whose estate he hath &c, and not have alleged it by way of *custom* in the borough; of which opinion was *the Court*; who said that the inhabitants of a vill or place cannot allege or plead a custom within such a vill or place to have an interest or profit *a prendre* out of another's soil. That the plaintiff might have prescribed that he, and all those whose estate he hath in his house, have used to have common; but he cannot allege it by way of custom; or he might have prescribed in the corporation, that the town of *Cambridge* was a corporation time out of mind, and that the corporation for themselves and every burghers had common &c; as *Melcher v. Spateman*, 1 *Saund.* 339. 343. That where a profit is to be claimed out of another man's soil, it must be alleged by way of prescription and not by custom; unless in the case of a copyhold tenant against his lord; or where the party pleading is a stranger to the title; as *Starr v. Rookefby*, *Salk.* 335; case, for that he was possessed of a close, adjoining to the defendant's, and the tenants and occupiers of the defendant's close had time out of mind used to repair the fences &c, and held good, because it was impossible for the plaintiff who was a stranger to set forth the particular estate, interest and title of the defendant." That case therefore seems decisive of the present. And one objection to the claiming such a right by custom is, that it cannot be released; whereas if it be annexed to the fee, it may. The distinction which has been mentioned has been uniformly allowed between a declaration and a plea; that in the former you may declare upon possession, in the latter you must set forth a strict legal right.

GROSE J. declared himself of the same opinion. But  
*The Court* gave the Defendant leave to amend.

1792.

GRIMSTEAD  
*against*  
MARLOWE.



1792.

Friday,  
June 15th.

Acts subsequent to the time of delivering goods on a contract may be admitted as evidence to shew that the goods were delivered on a partnership account, if it were doubtful at the time of the contract: But if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person, who may afterwards become a partner, (not even an acknowledgement that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods) will make him liable in an action for goods sold and delivered; though he will be liable in an action on the bill of exchange.

SAVILLE *against* J. ROBERTSON and J. HUTCHINSON.

THIS was an action for goods sold and delivered, brought under the following orders of the Lord Chancellor, made upon the petition of the plaintiff and others in the bankruptcy of the defendants; "I do order that the petitioner *W. Saville* be at liberty to prosecute such action at law as he shall be advised for the value of the said copper &c; in the defence to which action the said bankrupts are not to set up their bankruptcy; and all books &c, to be produced &c; and all further directions on the matter of the petition are hereby reserved until after the trial &c; dated 2d August 1790." I do order that the petitioner *W. Saville* be at liberty to try the said action for goods sold and delivered, as directed by my order made in this cause on 2d August 1790; with liberty, if the Court wherein the said action shall be tried shall think fit, to give the said bills in evidence without prejudice to the form of the action, as now directed: and all further directions &c reserved &c; dated 7th May 1791." At the trial a special case was reserved, which stated as follows. In April 1787 the defendants and one *Samuel Pearce*, since deceased, and *William Robertson*, since a bankrupt, entered into the following articles of agreement. Articles of agreement made this 19th of April 1787, between *J. Robertson* and *J. Hutchinson* of London, merchants and co-partners, as well on the part and behalf of themselves as of others who have or shall subscribe their names on the back of these presents, of the one part, and *S. Pearce* of &c, merchant, of the other part &c. Whereas the said *S. Pearce* is the sole owner and proprietor of the ship *Triumph* &c; and whereas the said *J. Robertson*, *J. Hutchinson*, *S. Pearce*, and others, who have subscribed their names on the back of these presents, have mutually agreed upon a joint undertaking and risk as to profit and loss in a certain voyage or maritime adventure about to be performed under the direction of the said parties who have or shall have a majority of interest therein, or of a committee appointed by them; now these presents witness that they the said *J. R.* and *J. H.* on behalf of themselves, and all others who have or shall subscribe &c, and the said *S. P.* for himself, in consideration of the trust which they severally repose in each other, and also in pursuance of the said agreement,



agreement, have and do each for himself, his heirs, executors &c, mutually covenant and agree with each other &c; 1. That the said ship *Triumph*, whereof the said *S. Pearce* is sole owner, shall from the day of the date and until her return from her intended voyage be at the disposal, direction, and risk of all the said parties hereto jointly, at the valuation of 3750 *l.* &c. 2d. That the said *J. R.* and *J. H.* by themselves and others who have or shall subscribe &c, shall and will on or before the 24th *August* next procure and provide a cargo of goods for the said intended voyage to the value of between 22,000 *l.* and 25,000 *l.* and *which goods shall in the judgment and opinion of the majority of the parties to these presents be deemed eligible and proper for the voyage and markets; and that the said goods shall be furnished or purchased at the lowest cash prices, although not payable till the usual period of credit is expired; the difference between the said cash terms and the given credit to be made good by giving bonds bearing interest from the date of the contract of such goods; and that they the said J. R. and J. H. and other the persons who subscribe &c, shall and will prepare and ship the said cargo at such time and in such manner as the majority of the said concerned or their committee shall direct. That all additional out-fits of the ship Triumph in cables, &c, which she may require &c, after the date hereof, &c until her voyage be concluded, shall be on the joint account, &c. 4th. That in case the said S. Pearce shall be desirous to encrease his interest in the said joint concern, he shall be permitted so to do, by shipping on the joint account as many goods, over and above the goods to be shipped by the said J. R. J. H. and others who shall subscribe &c, as he may think proper: but the said goods so to be shipped by the said S. Pearce are to be such articles as the majority of the concerned or their committee shall approve of as proper for the voyage and market. 5th. That the said 3750 *l.* together with the amount of the additional out-fits to be advanced by the said S. Pearce, the amount of half of the premiums of insurance to be made by the said S. P. on the said ship, freight, and cargo, and such amount of goods as the said S. P. may ship on the joint account as above mentioned, shall be considered as the said S. P.'s share or capital in the said joint undertaking; and he the said S. P. shall be entitled to receive the profit or bear the loss thereon in the exact proportion as the amount of all such sums shall be to the remainder or other part of the said joint concern; and that*

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the said *J. R.* and *J. H.*, and the subscribers &c, shall receive the profit or bear the loss in the like proportion as to the sums set opposite to their several names. 6th. Provided that *S. Pearce* shall get the insurances effected, and guaranty the solvency of the underwriters, if called upon: and when the policies are effected, each of the said parties is to hold his own respective proportion thereof, to the amount of his share and interest in the said joint concern. 7th. Although the said *S. P.* is to procure the whole of the said insurances on the said ship, freight and cargo, yet only half of the premiums of insurance shall be added to his interest in the said joint concern, pursuant to the 5th article: but all the said parties hold themselves bound with him to be answerable for the whole amount of the said premiums of insurance, and which is to be a charge on the voyage. 8th. That *S. P.* shall be the ship's husband to superintend such outfits of the said ship as the majority &c, shall deem necessary. (The 9th. relates to a schedule of the ship's tackle &c.) 10th. That all money received on account of the ship &c, shall be paid to the supercargo on the joint account. 11th. That in case the said *S. P.* shall want the assistance of the said *J. R.* and *J. H.* or the subscribers &c, to procure him the loan of any money to enable him to complete the outfits, they engage to procure him 500*l.* to be repaid by him in manner as therein stipulated. (12th. Not material.) 13th. That from and after the said ship shall leave the port of *London*, all the expences on the voyage shall be paid by the supercargo or agent for the said joint concern who shall be supplied with money for that purpose, or be empowered to pay the same out of the proceeds of the cargo. And if the said supercargo during the voyage is under the necessity of drawing bills on either of the said parties for the same, or he shall think the drawing such bills more beneficial to the joint concern than reimbursing himself out of the said proceeds, then each of the said parties interested in the said maritime adventure shall bear and pay his respective portion of such bills. 14th. That the parties hereto, or a committee, shall appoint officers of the ship. 15th. That when the ship is ready laden for sea, and previous to her sailing, *J. R.* and *J. H.* shall deliver an invoice of her cargo to the supercargo, who shall enter the same in proper books; and each party interested shall be therein credited with the amount of his respective accounts, and the supercargo shall prepare a statement of the whole amount of the said ship, outfits, cargo, and



and charges, declaring the exact proportions or shares which each person hath in the voyage, which shall be signed by each of the parties, and shall be a voucher for ascertaining the said shares hereafter, in profit and loss. 16th. That in case of any difference between any of the parties interested, it shall be referred to arbitration. 17th. That each party shall bind himself in the penal sum of 2000 *l.* for the performance of the articles. Signed and sealed by *J. Robertson, J. Hutchinson, S. Pearce, and W. Robertson.* On the 28th *July* 1787 the following memorandum was indorsed on the said articles by the same persons; “notwithstanding what may be understood to be the meaning of the foregoing articles, it is hereby declared by all the parties that the minute made on the 26th *June* last and signed by us respecting each of us, holding the proportions of one quarter each, that is to say, *Robertson and Hutchinson* one half, and *S. Pearce and W. Robertson* one quarter each, it is now fully to be considered and understood that that minute is now declared null and void, and that each party whose name is hereunto subscribed is to hold no other share or proportion in the said concern than the amount of what each separately orders and ships; and which interest will be hereafter declared agreeably to the true intent and meaning of this agreement. And it is further declared that the orders given for the cargo and outfit of the ship are to be each separately paid, and that one is not bound for any goods or stores ordered or shipped by the other. And that the said *S. Pearce* has free liberty to ship what goods are suitable for the voyage, over and above the ship and outfit, leaving room clearly for those ordered by *Robertson and Hutchinson and W. R.*; and it is to be understood that the ship is made over in trust for the general concern.” In *May* 1787, the plaintiff by the orders of *Pearce*, supplied copper to sheath and repair the ship *Triumph*, to the amount of 482 *l.* In *August* 1787 the plaintiff by the orders of *Pearce* delivered copper on board the said ship to the amount of 938 *l.* 3 *s.* 3 *d.* which formed part of the cargo thereof. In *October* 1787 the said ship sailed from *London* for *Ostend*, and proceeded from thence to the *East Indies* with the goods so furnished by the plaintiff and other goods on board. In *January* 1788 *Pearce* became a bankrupt, and *Saville* proved his debt under the commission against him; and in *February* 1788 *William Robertson* also became a bankrupt. On the trial *Mr. Kaye*, the plaintiff’s attorney, and who was solicitor to *Pearce*’s assignees, swore that the defendant *Robertson*

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told him that in *September* 1789 there had been an agreement between him (*Robertson*) and *Pearce's* assignees that he should go down to the coast to wait the ship's return from *India*; on her arrival he was to send word to the assignees, one of whom was to accompany him in the ship to *Ostend*, and there the ship and cargo were to be sold for the parties interested; That when the ship arrived, which was in *July* 1789, he (*Robertson*) went on board, and, without sending advice to *Pearce's* assignees, carried her to *Ostend*, and sold her for his own and *Hutchinson's* benefit; That his reason for not keeping his engagement with *Pearce's* assignees was, that he and his partner were liable to pay the whole debts for ship and cargo, and therefore he had possessed himself of the whole to answer those debts; and if there were a surplus he would account to *Pearce's* assignees for a proportion of it. On the 29th *October* 1789 the defendants accepted two bills of exchange of that date for the amount of the copper supplied by the plaintiff, drawn by the plaintiff payable two months after date, and stated to be for value delivered in copper to Messrs. *S. Pearce* and Co. In *January* 1790 before either of the bills was paid the defendants became bankrupts.

This case was argued in the last term by *Adam* for the plaintiff and *Burrough* for the defendants; and again on this day by *Bower* for the former and *Bearcroft* for the latter.

It was admitted that the plaintiff was entitled to recover for the copper for sheathing.

It was argued for the plaintiff, 1st. That the defendants were liable for the rest of the goods, as partners, on the construction of the articles, coupled with their subsequent acknowledgement, and their acceptance of the bills of exchange, drawn for the very goods; and these cases were cited, *Abbott v. Smith*, 2 *Bl. Rep.* 947; *Bloxam v. Pell*, cited in 2 *Bl. Rep.* 999; *Hoare v. Dawes*, *Dougl.* 371, 3d edition; and *Coope v. Eyre*, *H. Bl. Rep.* 39. But 2dly, If the plaintiff could not recover in an action for goods sold and delivered, that the defendants were liable on their acceptance of the bills; and that the Lord Chancellor intended by the second order to give the plaintiff an opportunity of recovering either in the one form or the other.

These points were resisted by the counsel for the defendants; the first on this ground, that the defendants were not partners at the time when the contract was made; and that, though their subsequent acts might explain the original contract, if it were doubtful at the time, they could not alter the original contract

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against the intention of the parties, as expressed in the articles. On the second head, it was said that the meaning of the order was only to permit the bills to be given in evidence to explain the intention of the parties on the whole transaction, but not to make the bills the foundation of the action, which was expressly ordered to be brought to recover the value of the copper.

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Lord KENYON, Ch. J. Some of the points made at the bar admit of no doubt. It is clear that, if all these parties had been partners at the time when these goods were furnished, though that circumstance were not known to the plaintiff, they would all have been liable for the value of the goods. It is equally clear that such an action might be maintained against the dormant partners alone, unless they pleaded in abatement. Nor can any doubt be entertained but that, if this had been an action on the bills of exchange, the plaintiff might have recovered: there was a consideration for them; and being in writing, the statute of frauds would have been satisfied, though they were promises to pay the debt of another person. But my difficulty arises from the form of this action, which is for goods sold and delivered; for I do not see how any act, which passed subsequent to the delivery of the goods, can have any retrospect so as to alter the nature of the contract, which was not doubtful. It might have been evidence to explain it to be a partnership contract, if the contrary had not expressly appeared. The facts of the case are shortly these; several persons who had no general partnership, nor any connection with each other in trade, formed an adventure to the *East Indies*. The outfit of the vessel was a joint concern of all the partners; and that delivers the case from one consideration, namely, the parcel of copper for sheathing the ship; which is admitted to be a partnership concern. But beyond that I see no partnership between the parties till all the parcels of the cargo were delivered on board; and that made it a combined adventure between all the parties. It was very properly asked, in the argument, if they were partners when the cargo was delivered, what share had *Pearce*; by the articles he was not to bring in any definite aliquot part of the cargo; but the agreement only was that he should share in proportion to the part he should bring in; it was optional in him whether or not he would bring in any goods; and by another part of the agreement, if he were under any difficulty in bringing in the money, the others were to lend him credit. It is true that it was to be determined by a majority of those concerned



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concerned in the adventure whether the goods, which were to be sent to market, were or were not proper; and so far they all looked to each other's acts: but each of them was to bring in his share only; and I cannot distinguish this case from that put at the bar, where several persons were to contribute their separate *quota* of money, and they applied to different scriveners to procure it; they could not all be liable for the capital which each should borrow. At the time when this copper was furnished, *Pearce* stood in no relation whatever to the other persons, but he alone bought the copper in his own name, without carrying to market the name of any other person but his own. Suppose the plaintiff had brought an action for this copper the instant it was delivered on board; against whom must the action have been brought? *Pearce* only; for he alone was answerable at that time. I cannot therefore see how it can be said that these goods, which were sold to *Pearce* only, and on his sole credit and account, were sold and delivered on the partnership account. Afterwards indeed these defendants were to gain or lose by the joint cargo; when the other goods were brought in, the partnership arose; but each was to bring in his own particular stock. But in this case I think that the question stops short of affecting the defendants; and I cannot see how the plaintiff can have a right to call on the defendants, as partners, for the value of these goods, on a supposed contract, when the real contract between the buyer and seller was consummated before the joint risk began. Suppose several persons agreed to open a banker's shop, and it was agreed that each partner should bring into the house a certain sum of money as his share; it could not be contended that, if one of them were to borrow money for his share, all the others would be liable for it.

The great question however still is, whether under all the circumstances of the case all these parties are answerable? I think they are, but they can only be adjudged to be responsible in another form of action, and not in this, which is an action for goods sold and delivered. If the action had been brought upon the bills, I think they would have been liable.

ASHHURST, J. This case comes before us much entangled in the form of it: but at present the inclination of my opinion is that, even in this form of action for goods sold and delivered, the plaintiff may recover. I admit that evidence subsequent to the contract cannot vary the nature of the contract, but it may explain



explain the intention of the parties to the original contract. If the ordering of the goods by *Pearce* were the only evidence in this case, he alone would be answerable for the payment of them: but, when he bespoke them, it is clear that he did it with a view to a partnership transaction; and that this was a joint concern was shortly afterwards explained by the memorandum of *July 1787*, which is indorsed on the articles; both of which must be taken into consideration together, in order to see the nature of the contract. The fourth, fifth, and fifteenth, articles are strong to shew that this was a partnership concern. By the fourth, *Pearce* was to be at liberty to ship *on the joint account* as many goods as he chose, provided they were such as the majority of those concerned should approve. Now if this were not intended to be a partnership account, the rest of those concerned in the adventure could have no interest or concern in the goods shipped by him: but if they were all to share in the profit and loss of the whole adventure, then there was good reason why they should have an opportunity of approving of those goods. The fifth article shews this still more strongly; it is, that the 3750 *l. &c.*, and such amount of goods as *Pearce* may ship *on the joint account* as above mentioned, shall be considered as *Pearce's* share or capital in *the said joint undertaking*; and that he shall be entitled to receive the profit or bear the loss in proportion *&c.*, on the *joint concern*. Now a partnership is a joint undertaking to share in the profit and loss; but such was this undertaking: It was not only a joint concern in the ship, but also in the cargo. The fifteenth article also is material; which directs that, previous to the ship's sailing, books shall be kept in which each party interested shall be therein credited with the amount of his respective accounts, and that the books shall be signed by the parties, which shall be a voucher for ascertaining the shares hereafter in profit and loss. Now that clearly evinces what was the original intention of the parties. It is true that when the contract was made the goods were not furnished on the joint credit of *Pearce* and the defendants, but of *Pearce* alone: but that is the case with dormant partners, and there the party furnishing the goods may resort to all those who are entitled to share in the profits. For though in such case the dormant partners may not be known at the time of the contract, yet when that fact is ascertained the creditor has a right to avail himself of that evidence. The evidence of *Kaye* likewise is important; for he proved an acknowledgment by one of the de-

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defendants that they were liable to pay the whole debt for the ship and cargo. This shews that they considered themselves as partners in the original transaction. And though subsequent evidence will not make a new contract, it may explain what that contract was. However, if this opinion be not well founded, the plaintiff would be entitled to recover on the bills of exchange.

BULLER, J. It is for the interest of all the parties that we should now dispose of the case before us, whatever may be done hereafter in the Court of Chancery. For if the grounds on which we proceed be distinctly known, it will put an end to further litigation. The only difference of opinion between my Lord Chief Justice and myself arises on the last order of the Court of Chancery; but that order, I think, will be best explained hereafter by that Court. If this be considered purely as an action for goods sold and delivered, brought adversely in a court of law, and unconnected with the proceedings in the Court of Equity, I entirely agree with my Lord that the plaintiff cannot recover against these defendants the amount of *Pearce's* share of the cargo. To make this case clear, suppose these defendants and *Pearce* had agreed to be concerned in a joint adventure, in which they were to be interested according to the proportion which each furnished, and that each were to bring in goods to the amount of 900*l.*; and suppose the two defendants had paid for their shares, and *Pearce* had not, and that the defendants were also to be liable with *Pearce* for his share, in that case they would be liable for 900*l.* each more than *Pearce*, and would not be entitled according to the proportion which each brought in. In the argument an attempt was made to distinguish between the time of the contract and the time of the delivery: it is certainly true that if one partner order goods himself, without disclosing the names of the other partners, and the goods be afterwards delivered to them all, they are all liable, because the delivery and the sale are considered as forming one entire contract, and the delivery is supposed to be according to the sale. In such a case the one partner, who buys the goods, does not contract for himself but on account of the partnership. In that way of considering the question, upon the first order of the Court of Chancery, I think the plaintiff could not recover against these defendants for the amount of the goods sent in *August*, as *Pearce's* share, in an action at common law for goods sold and delivered; because the goods were neither sold or de-  
livered



livered to the partnership. But that would be to dispose of the case according to the mere form of the action.

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But, according to my construction of the second order, we are not to consider the question in that light; for it is ordered that the plaintiff may give the bills in evidence, without prejudice to the form of the action; and therefore I think that this case is to be considered on the broad ground of substantial justice. This lets in the other question, whether, if the action had been brought on the bills, the plaintiff would not be entitled to recover? And that he would I think no doubt can be entertained; for the bills of exchange were given for a good consideration. The defendants took possession of the cargo, declared themselves liable for the amount, and accepted bills expressly drawn for the value of the cargo; and therefore upon those bills the plaintiff might unquestionably recover.

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Considering this as an action brought under the direction of the Court of Chancery, I think it is our duty to state the law upon the whole of the case.

GROSE, J. We must consider this case, as the record states it to be, as an action for goods sold and delivered. And I cannot distinguish it from that put in argument, of several persons agreeing to enter into partnership, each bringing in a stipulated sum of money, and each borrowing his proportion of different persons; in which case it is impossible to say that the persons advancing the money could maintain actions against all the partners for the several proportions lent to each. But if the question were whether *any* action would lie, I have no doubt but that the plaintiff might recover against the defendants on the bills of exchange; which are written contracts, and were given for a valuable consideration, the defendants at that time being in possession of the whole of the cargo.

Lord KENYON, Ch. J. then said he hoped it would be remembered, when this case was returned into Chancery, that this Court were unanimously of opinion that on the whole justice of the case the plaintiff was entitled to recover.



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Wednesday,  
June 13<sup>th</sup>.The KING *against* The Commissioners of the Navigation of SALTER'S LOAD SLUICE to STANGROUND SLUICE.

By an act of parliament the commissioners of a navigation were authorized to take certain tolls, the whole of which were directed to be applied to public purposes; held that the tolls were not rateable to the poor.

A Poor rate, by which the defendants were assessed to the relief of the poor in the parish of *Stanground*, for the tolls of a sluice, was confirmed at the *Ely* sessions, subject to the opinion of this court on the following case. In that part of the parish of *Stanground*, which is within the Isle of *Ely*, a certain sluice was erected in the year 1640, called *Stanground Sluice*, and was supported by the corporation of the *Bedford Level*, as a work of drainage only, across a navigable river called the River *Nene*, to prevent the waters running down the said river, and to turn the same down a new cut, called *Moreton's Leam*. In the year 1753 it was found necessary to apply to parliament for an act to improve the navigation of the River *Nene*; and accordingly in the 25th of *Geo. 2.* an act was obtained for improving and preserving the navigation from *Salter's Load Sluice* in *Norfolk* to *Standground Sluice* &c; in which certain tolls were made payable at the said *Sluice* in the parish of *Standground*, by every person who should carry or convey any goods through it, up or down the river. The tolls are collected at the sluice by an officer resident there, and appointed by the commissioners under that act; and they are by the said act vested in the commissioners, and directed "to be applied and disposed of for the several uses and purposes of the said act, and to no other use or purpose whatsoever." The commissioners have borrowed upon mortgage of the said tolls, with other tolls arising upon the said navigation, 10,000 *l*; eight year's interest of which is now in arrear. The tolls arising from such navigation amount to 50 *l. per annum*.

*Bower* and *Dauncey*, in support of the order of sessions, contended (a) that these tolls, which are due and collected in the parish of *Standground*, are rateable there, notwithstanding the words in the act "that they shall be applied to the purposes of the act, and to and for no other use or purpose whatsoever." The meaning of those words is, that the clear produce of the tolls, after deducting the expence of collecting them, and all

(a) On Wednesday June 17th.



the charges and burdens to which property of every description is liable, shall be applied to the purposes of the act. If the Legislature had intended to exempt these tolls from the payment of rates and taxes, they would have inserted a clause for that purpose, as was done in the general turnpike act (a); in the act mentioned in *R. v. Scott* (b); or as in the *Aire and Calder* navigation act, where the tolls are exempted from particular rates. The Legislature, having made a special exemption in these instances, must have understood that without it the tolls in those several cases would have been liable to all rates; from whence it follows that the tolls collected under this act are rateable, there being no exemption.

*Erskine and Cosfle, contra.* It is begging the question in this case to say that the tolls are not exempted by the act from all rates and taxes; for it may be fairly contended that the very clause, which directs the application of the tolls to the purposes of the act, makes the exemption. The poor rate is a tax on the person in respect of property; and not a tax on property itself. But these commissioners, who have been rated, have no property in the subject in respect of which they are rated; and in this respect this differs from all the cases in which tolls have been held rateable. The commissioners are mere trustees; they have a public trust for certain public purposes, and can derive no possible advantage to themselves from the tolls. In the Dock Company of *Hull* (c) the proprietors of shares had beneficial interests. So too in *R. v. Cardington* (d) the grantee of the *Ouze* navigation received a large profit, after paying all expences. And in *R. v. the Mayor &c. of London* (e), it was not stated negatively that the city had no beneficial interest: but the contrary was to be presumed; for they were found in possession of valuable property, and the act only directed them to lay an annual account of the tolls before parliament; but there was no provision in that act that all the tolls collected should be expended for the purposes of the public.

*The Court* wished to look into the cases cited; and now Lord KENYON, Ch. J. delivered their opinion.

It is not sufficient to point out property within the parish, in order to shew that it is rateable to the poor: but there must also be some person or persons in the beneficial occupation of it; I say *persons*, because corporations may unquestionably be rated,

(a) 13 Geo. 3. c. 84. s. 56.

(b) Ante 3 vol. 602.

(c) Ante 2 vol. 219.

(d) *Cowp.* 581.

(e) Ante 21.

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SALTER'S  
LOAD  
SLUICE.

though it was once thrown out by *Yates, J.* that they could not. Now in the present case there is property, which is the subject of a rate: but there is no occupier of it. The trustees have a bare naked trust, not coupled with any interest. If any interest resulted either to the commissioners, or to the owners of the adjoining land, after the public purposes of the act were answered, these tolls might have been rated. But it is admitted that all the money, which is collected under this act of parliament, must be expended for the purposes of the act; and therefore upon the ground, upon which the Court proceeded in *R. v. St. Luke's Hospital (a)*, namely, that there was no occupier, these commissioners are not liable to be rated. This case is distinguishable from *R. v. the Dock Company of Hull*, *R. v. the Mayor &c of London*, and all the other cases mentioned in the argument, on the ground I have stated, that the commissioners are mere trustees to superintend the execution of this act, without any personal advantage. In the *Hull* case the owners of shares received great profits; and in the *Hampton-wick* case, there was a surplus value of the land belonging to the corporation of *London*, which was rateable in their hands.

Order of sessions quashed.

(a) 2 Burr. 1053.

Wednesday,  
June 20th.

### The KING against The Inhabitants of LEIGHTON.

If the friends  
of an appren-  
tice covenant  
to maintain  
him and to  
provide him  
with clothes  
it is not such  
a benefit as  
is liable to  
the duty im-  
posed by  
8 An. c. 9.  
s. 45.

TWO justices removed *Joseph Price*, his wife, and their two children, from *Leighton* to *Church Coppenhall*, both in the county of *Chester*: On appeal the sessions quashed the order of justices, subject to the opinion of this Court on the following case. The pauper *Joseph Price*, was bound out an apprentice by his father, (who was settled in *Woolstanwood*) to *R. Lindop* of *Church Coppenhall*, shoemaker, under an indenture for four years, to learn the trade of a shoe-maker; in which was a covenant by the father of the apprentice that he would, at his own charge, find and provide for his son good competent and sufficient meat, drink, and lodging, on every *Sunday* in the year during the said term; and would provide him with clothes and apparel of all sorts, (except working aprons and shoes) and also washing. There was also (*inter alia*) a covenant on the part of the master to provide for the apprentice meat, drink, and lodging (except on *Sundays*) during the term. The indenture was properly executed, and attested, and written on a 5 s. stamp.

The



The pauper served under the indenture for the four years in *Church Coppenhall*, for six days and nights in each week, and went to his father's at *Woolstonwood* on every *Sunday*. The pauper's father expended 5*l.* and upwards in clothing his son, and in providing meat, drink, &c. for him on *Sundays* during the four years under this covenant; for this no additional duty was paid, according to the stat. 8 *Ann.* c. 9.

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against  
The Inhabi-  
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*Erskine*, in support of the order of sessions, contended that the maintenance of the apprentice on *Sundays* was a benefit to the master, for which a duty ought to have been paid under the stat. 8 *Ann.* c. 9. §. 45. which enacts "that where any thing, not being money, shall directly or indirectly be given, assigned, conveyed, delivered, contracted for, or secured, to or for the use or benefit of any master, with or in respect of any such clerk, apprentice, or servant, for whom a duty is chargeable by this act, the duties hereby granted shall be paid for the full value of such thing, or things, &c." This question never having been decided, the best construction, which the Court can put upon the statute, is that which will prevent fraud. If the word "thing" be confined to something actually given at the time of binding, or secured to be delivered afterwards, it will be open to great fraud; to prevent which it should be construed to mean any benefit to the master. Then, as by law the master of an apprentice is bound to maintain the apprentice, his being exempted from that burden, though only for a part of the year, is a benefit to the master, for which a duty ought to be paid. It is the same, in effect, as giving something to him. And he stated that it was customary at the Stamp Office to set a value upon such benefits as the present, in order that the duty might be paid.

*Bearcroft*, and *Manley*, *contra*. The argument on the other side proceeds on a supposition that by law the master is bound to provide for his apprentice: but the law throws no such obligation upon the master; and therefore the supposed consequence does not follow. That the master is not bound to provide for the apprentice is manifest from the stat. 8 & 9 *W.* 3. c. 30. §. 5. which, after reciting that it was doubted whether the persons, to whom poor children are bound under the 43 *Eliz.* c. 2. are compellable to receive such children as apprentices, enacts "that where any poor children shall be appointed to be bound apprentices, pursuant to the said act, the persons to whom they are so appointed to be bound shall receive and provide for them, &c." It is equally clear from the word

"apprentice,"



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"apprentice," and from the object of apprenticeship, that the duty of the master, *quà* master, is only to instruct. "Apprentice" is derived from "*apprendre*"; and the object of putting out an apprentice is the learning of a trade. In most cases indeed it is convenient to all parties that the master should provide sustenance for the apprentice, who is living under his roof: but that is a mere matter of agreement; and the very circumstance of inserting such a covenant in most indentures strongly shews that, without it, no such obligation would be thrown on the master. The father is under a legal, as well as moral, obligation to provide for his son; and that obligation still continues, notwithstanding the apprenticeship; although for his own convenience he generally contracts with the master that he (the master) shall provide for him. If it be said that the master must feed the apprentice, the argument must go the length of saying that he must also clothe him; for the one is as necessary as the other: but that was never contended for. In *Pennington v. Sudall* (a), where the question came directly before the Court, *Wallace*, who was to have argued that a duty ought to have been paid for the benefit which the master derived from the father of the apprentice agreeing to provide meat, drink, and clothing for the apprentice, gave up the point without argument. And in *R. v. Portsea* (b), *Aston*, J. "hinted that the 45th section of this act, which says "that where any thing or things, not being money, shall directly or indirectly be given," means such other equivalents as a horse, or other valuable thing of that sort; not such an agreement as this is, to provide necessaries for his son."

LORD KENYON, Ch. J. This has been *vexata questio* ever since I came into *Westminster Hall*; and various opinions have been entertained upon it. It is true that if an indenture be taken to the Stamp Office, they will set their value upon every supposed benefit to the master for the sake of the revenue: but that is by no means decisive. The question depends on the stat. 8 *Ann.* c. 9. s. 32 & 45.; the former of which sections imposes a duty on all sums of money given with any apprentice &c.; and the latter enacts that where any *thing*, not being money, shall be given, contracted for, or secured, to or for the use or benefit of the master, the duty shall be paid for the full value of such thing, in the same manner &c. The latter provision was inserted for the purpose of protecting the revenue from any

(a) *Bott.* 155. pl. 281.(b) *Burr.* S. C. 838.



fraud which might otherwise be practised by the parties giving something in lieu of money. For if, as in the case put by *Aston, J.*, a horse or other valuable thing of that sort, be given by the friends of the apprentice to the master, that must be considered to be a benefit to the master, for which a duty should be paid. It occurred to me early in the argument that, in order to see what would or would not be considered as a benefit to the master, it was necessary to enquire what were the duties that resulted from the bare relation of master and apprentice. And I think that the statute of 8 & 9 *W. 3. c. 30. §. 5.* throws a great deal of light upon that point; because if from the time of the statute of *Elizabeth* to that time masters could not be compelled to provide for parish apprentices, and that law was made for the purpose, it shews that the obligation of providing for apprentices did not result from the mere relation of master and apprentice; for if it did, that part of the statute of *Will. 3.* was unnecessary. The case of parish apprentices is the only one where an apprentice can be put out *nolens volens*: all the others depend on the express stipulations to be made by the parties interested. It has never been held that the obligation of the master extended to the providing of clothes for the apprentice, and yet I cannot distinguish that from the obligation to provide sustenance; for the former are equally necessary with the latter; and in other cases than those of parish apprentices clothes are generally provided by the friends of the apprentice. But if every thing is to be valued, and a duty set upon it, from which a benefit arises to the master, it might be equally said that the earnings of the apprentice should be liable to the duty. The argument, therefore, that every benefit which the master derives from the apprentice, by proving too much, proves nothing. The authority of *Aston, J.* is in all cases worth resorting to, but particularly so in cases of Sessions law, in which he was remarkably conversant. And his opinion in the case alluded to is very strong to this point. I think, therefore, that the clear meaning of the statute of *Anne* is that where money, or money's worth, is given to the master by the friends of the apprentice by way of premium, a duty ought to be paid for it; but that where, meat, clothes, &c, are to be provided by the master, no duty is payable, because there is not any *thing given to the master*.

BULLER, J. (a) The construction, which *Aston, J.* put on this act of parliament, seems to be a sound one, and is warranted by

(a) Lord Commissioner *Asbursft* was sitting | day in the Term.  
in Chancery on this and every subsequent

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the words of the statute, which are "that where any *thing*, not being money, shall directly or indirectly be *given &c. contracted for, or secured, to or for the use or benefit of any master, &c.*" Then by the very words of the act it must be something contracted for, or given to or for the use of the master, *independently of the apprentice*. The statute then goes on to say "with or in respect of any apprentice for whom a duty is chargeable by the act:" this refers to the 32d section, where the words are "sums, which shall be given, paid, contracted, or agreed for, with or in relation to every apprentice &c." Now all these terms mean something, which is *given to the master*, or contracted for; and only apply to cases where the master is to derive a benefit from the friends of the apprentice, independently of the benefit to be derived from the apprentice himself; and therefore whatever is given for the advantage, benefit, or accommodation, of the apprentice does not fall within the meaning of this clause. What was said by the Court in *R. v. North Oworm* (a) strongly supports this determination. There the grandfather agreed before the binding to give the master 30s. to clothe the apprentice, the master having refused to take the apprentice unless he were better clothed; and the Court said "it is not a premium received by the master: the statute means something given directly or indirectly for the benefit of the master." I am therefore of opinion that what is given for the benefit of the master must be paid for; but that what is given for the benefit of the apprentice is not within the words of the act of parliament.

GROSE, J. When we consider the nature of an apprenticeship, the words of the act of parliament, and what has been said in other cases, this question does not admit of much doubt. What is an apprenticeship, but the putting out a young person to a master to teach him his trade. Instruction on the one hand, and service on the other, are the objects of apprenticeship. But sometimes it happens that certain apprenticeships are likely to prove lucrative to the parties, and parents are induced to give large sums of money for the purpose of having their children instructed in particular kinds of business. This the Legislature considered as a fair object of taxation: but, as frauds might have been committed on the revenue if the tax had been confined to *money* only, this provision was made in the act extending the duty to "things" as well as money. Still however the Legislature only intended to tax those things which were given in lieu of money

(a) *Burr. S. C.* 147.



as a premium to the master to teach the apprentice his trade. This construction of the act appears to be strongly confirmed by what fell from *Aston*, J. in the case cited at the bar, as well as by what was said in the case mentioned by my brother *Buller*. Therefore on the reason of the thing, on the words of the act of parliament, and on the authorities, I am of opinion that this benefit to the apprentice was not a "thing" for which a duty is payable under the statute.

Order of Sessions quashed.

MOSES GRIFFITH *against* B. HARRISON, ELIZABETH GRIFFITH, T. HARRISON GRIFFITH, CHARLOTTE GRIFFITH, JOHN YELDHAM and M. YELDHAM.

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*S.C. when heard  
in Chancery 3. Br.  
Charles 110.*

THIS was a Case from the Court of Chancery. Doctor *Guyon Griffith* made his will, dated 27th May 1777; and having afterwards purchased and become seised in fee-simple of a freehold farm, called *Vawtorts*, and seised to him and his heirs of certain copyhold lands (part of the farm called *Vawtorts*) according to the custom of the manors whereof they were respectively holden, and having duly surrendered the copyholds to the use of his will, he by a codicil dated 7th March 1781, and executed and attested so as to pass real estates, gave and devised the said farm and premises unto *Frances* his wife during her life-time, and after her decease "to such child or children of him the said devisor, as she should judge most proper to bequeath the same to by her will." Doctor *Griffith* by another codicil to his will, dated 31st December 1783, and executed and attested so as to pass real estates, ratified and confirmed his will, and former codicil, and devised his estate, called *Vawtorts*, both freehold and copyhold, to the use of his wife during her life, and directed and empowered her to give and devise the same to any one or more of his said child or children by her, in such manner, share, and proportion, as she should direct and appoint in and by her last will in writing, duly executed, *but so as the said estate should not be divided, but transmitted whole and entire to his heirs.* And after reciting also that he was entitled to the reversion (and which reversion hath since fallen into possession) of a certain messuage, &c, adjoining to *Vawtorts*, he devised the same unto his wife for life, to be enjoyed by her as part of the estate, called *Vawtorts*, and to be



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be annexed thereto; and he also directed and empowered his wife to devise and bequeath the same to any such one or more of his said children as she should appoint and direct in and by her last will; and declared his will and intention to be, that the said estate and lands called *Vawtorts*, and the said other estate thereto adjoining, should be considered *as one estate and be transmitted entire to his family*; and also declared that in case his wife should not execute her will in due form, or should neglect or omit to make such appointment, and devise as aforesaid, he thereby devised the same premises and every part and parcel thereof to the use of his own right heirs. Doctor *Guyon Griffith* died in *January 1784*; leaving *Frances Griffith* his widow, and five children by her, *viz.* the said *Moses Griffith* his eldest son and heir at law, and also his heir according to the custom of the respective manors whereof the copyhold lands are holden, the said *Thomas Harrison Griffith*, *Guyon Griffith*, the said *Elizabeth Griffith*, and *Charlotte Griffith*; all of whom were living at the time of his making both the codicils to his will. *Frances Griffith* is since dead, having first made her will, dated *12th April 1784*, and executed and attested so as to pass real estates; whereby, after reciting the before mentioned codicils, she by virtue of the powers and authorities to her in that behalf given, gave, devised, directed, and appointed, to her said son *Guyon Griffith* all the said estates so comprised in the devise and power of appointment to the use of her said son *Guyon Griffith* for life, remainder to the use of *J. Yeldham* and *M. Yeldham* and their heirs, during the life of *Guyon Griffith* the son, in trust to preserve contingent remainders, remainder to the use of the first and other sons of *Guyon Griffith* (the son) successively, in tail general, remainder to the use of the first and other daughters of *Guyon Griffith* (the son) in tail general; remainder to the use of *M. Griffith* for life, with remainder to the same trustees during his life, in trust to preserve contingent remainders, remainder to his first and other sons successively in tail general, remainder to his first and other daughters successively in tail general; with like remainders to *T. Harrison Griffith*, *Elizabeth Griffith*, and *Charlotte Griffith*, respectively in strict settlement. *Guyon Griffith* (the son) survived his mother, but is since dead, an infant, and without issue, leaving *Moses Griffith* his eldest brother, and heir at law, and also heir according to the custom of the several manors whereof the said copyholds are held. *Moses Griffith* the eldest son, and heir of *Guyon Griffith* the deviser, and also the heir



heir of *Guyon Griffith* (the son) having after the death of his brother contracted with *Benjamin Harrison* to sell him the estates both freehold and copyhold devised by the codicils of *Guyon Griffith* (the father) and appointed by the will of *Frances Griffith*, *Benjamin Harrison* objected to the title to the estates; and thereupon *Moses Griffith* filed this bill against the defendants for a specific performance of the agreement for such sale.

The question sent for the opinion of the Court is, What estates each of the children of the said *Guyon Griffith*, the father, and *Frances Griffith* his wife, namely, *Guyon Griffith*, *Moses Griffith*, *Thomas Harrison Griffith*, *Elizabeth Griffith*, and *Charlotte Griffith*, took respectively in the premises in question?

This case was twice argued; the first time by *Shepherd* for the plaintiff, and *Harrison* for the defendants, in *Hilary* term last; the second by *Bower* for the former, and *Morris* for the latter, in *Easter* term: but the certificates were not sent till this term.

The plaintiff's counsel made two points; 1st. That the power was not well executed by Mrs. *Griffith*, and that *Moses Griffith* took an estate in fee in the premises in question, as the heir at law of Doctor *Griffith*; 2dly. That if the limitations in Mrs. *Griffith*'s will could not take effect as she intended, and the Court should be inclined to give effect to them as nearly as might be, then according to the doctrine of *cy pres* M. *Griffith* took an estate tail. As to the first; the power was to appoint to children; but the appointment is to grand-children as purchasers, and cannot therefore be supported. *Alexander v. Alexander*, 2 Vez. 640; *Adams v. Adams*, Cowp. 651; *Pitt v. Jackson*, 2 Bro. Ch. Cas. 51; and *Robinson v. Hardcastle*; ante 2 vol. 241. The appointment is (after the limitations to *Guyon Griffith*) to *Moses Griffith* for life, remainder to his first and other sons in tail general, remainder to his daughters in tail general, remainder to *T. H. Griffith &c.* Now the estate-tail to the children of M. *Griffith* being void, as not being warranted by the power, the subsequent remainders to *T. H. Griffith* are also void. The estate to *T. H. Griffith* must take effect, if at all, either as a contingent remainder, or as an executory devise: but in all cases of contingent remainders it is necessary that there should be a preceding estate of freehold to support it. Now the estate for life to *T. H. Griffith* is not connected with the preceding life estate to M. *Griffith*; there is a chasm between them; and in order to support the former it should vest immediately on the determination of the life estate of M. *Griffith*. It is clear also from

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Mrs. *Griffith's* will that she did not intend that *T. H. Griffith* should take till there was a failure of issue of *M. Griffith*. Neither can the limitation to *T. H. Griffith* be supported as an executory devise, because it is too remote, being after a general failure of issue of *M. Griffith*. *Goodman v. Goodright*, 2 Burr. 873; and *Dougl. (a)* 507. n. 3. S. C. If it be contended that the estate to *T. H. Griffith* is accelerated by the destruction of the estates to the first and other sons of *M. Griffith*, what was said by *Buller, J.* in *Robinson v. Hardcastle (b)* is a decisive answer to it; "The second ground on which the plaintiffs' title has been rested is that if the intermediate limitations in strict settlement to the son be void, it shall accelerate the plaintiffs' remainder in fee. But the case of *Alexander v. Alexander* is decidedly against it; for the Master of the Rolls there said that though the children could not take, yet they should prevent the limitation over. When this case was directed to be sent here, the Lord Chancellor very properly observed that to support this argument the deviser must be considered as intending that if the first use were bad the subsequent limitation should take place, though this seemed an extraordinary attempt to attribute to him. It would be extraordinary indeed, for then it must be said that, though the deviser has expressed an intention in his will to provide for his son and his issue, the grand-child should be disinherited; which must be the consequence if the plaintiffs' remainder should be accelerated." Secondly, But if the Court think that, though the limitations cannot be supported in the manner pointed out by Mrs. *Griffith*, they ought to effectuate her general intent as nearly as may be, then *Moses Griffith* must take an estate tail; since it was her intention that the children of *Moses Griffith* should take before *T. H. Griffith* or any of his children. And this may be done on the authority of *Brown v. Chapman*, 3 Burr. 1626; and *Pitt v. Jackson*, 2 Bro. Cha. Cas. 51.

For the defendants it was argued, 1st, That all the limitations by Mrs. *Griffith's* will might be supported; but 2dly, That, if they could not all stand, the life estates to the children of Doctor and Mrs. *Griffith* were good; and 3dly, That *Moses Griffith* could not be adjudged to take an estate tail on any principle of law.

First, The limitations to the grand-children are good in point of law, and they are warranted by the power of appointment. The power was to appoint to "children": now though the word

(a) 3d Edit.

(b) Ante 2 vol. 253.

"children"



"children" has in most of the cases been confined to *immediate children*, because the context of the power and the particular circumstances of those cases required it, yet it is comprehensive enough to include "family" "descendants" and "grandchildren." In three of the cases cited the power was created before any of the children were *in esse*, and therefore it could not by law be extended to grandchildren, because the person executing the power can only appoint in the same way that the person creating the power could, and he could not give life-estates to unborn children, with estates of inheritance to their children; in the other case, *Adams v. Adams*, the words in the power were "to the child or children of S. A. on the body of F. begotten or to be begotten" which confined the meaning to the immediate children of those two persons. But in this case there is no objection in point of law to the appointment to grand-children; for Doctor Griffith himself might have limited the estate exactly as Mrs. Griffith has done, because all the objects of the appointment were *in esse* when the power was created. And it is apparent from several parts of Doctor Griffith's will and codicils that he intended that the estate should be limited to his grand-children. In one of his codicils, where he enabled Mrs. Griffith to appoint to his children, he added this restriction "but so as the said estate should not be divided, but *transmitted whole and entire* to his heirs"; and in another part that "the newly purchased land adjoining to *Vawtorts* and *Vawtorts* should be considered as one estate, and be transmitted entire to his family." From these words, "transmit" "whole and entire" and "family" it is clear that Doctor Griffith intended that his widow should limit the estate to their children in strict settlement. And the power being to appoint "in such manner &c", it includes all the circumstances attending the execution of it. But this does not depend on reason only; for the case of the Duke of *Devonshire v. Lord George Cavendish* (a) decides the present. There a power to appoint

(a) *DOE* dem. Duke of DEVONSHIRE and Duke and Duchess of PORTLAND v. Lord GEORGE CAVENDISH, H. 22 G. 3. B. R.

This was an ejectment for a messuage in the parish of St. James, *Westminster*, tried at the Sittings before Lord Mansfield at *Westminster*. A verdict was taken for the Plaintiff, subject to the opinion of the Court on the following case. Lady Burlington, being seised in fee of the messuage

in question, made her will, dated 20th Feb. 1755, to the effect following; "I do give and devise all my manors, messuages, lands, tenements, mines, fee farm and other rents, advowsons, &c, and hereditaments whatsoever, in *Great Britain*, or elsewhere, with their rights, members, and appurtenances, unto R. Arundell and C. Denton, their heirs and assigns, to have and to hold, &c. to the following uses, *viz.* to the use and behoof of my



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appoint to children, as in this case, was held to extend to grandchildren; because the Court thought that it was the intention of the

my son in law *William Lord Cavendish*, otherwise Marquis of *Hartington*, and his assigns for his life, without impeachment of waste, &c., and then to trustees to preserve contingent remainders, in case of the determination of the estate during his life by forfeiture, &c.; and after his decease to the use and behoof of such of his child or children by *Charlotte Lady Cavendish*, his late wife, for such estate and estates, and in such shares and proportions, and under and subject to such powers, provisos, conditions, restrictions, or limitations, as he shall by deed in writing, signed and attested by and in the presence of two or more credible witnesses, or by his will so signed, &c, nominate, direct, limit, or appoint; and in default of such nomination, to the use of all and every the child or children of the said *William Lord Cavendish* by the said *Charlotte Lady Cavendish*, equally to be divided between them, if more than one, share and share alike; to take severally as tenants in common, and not as joint tenants; and of the several and respective heirs of the body or bodies of all and every such child or children, lawfully to be begotten; and failing issue of any one of the said children, then as to the share or shares of him her or them so dying without issue, to the use of every other such child or children, equally to be divided between them, &c (as before); and if but one child then to the use of such child, and the heirs of his or her body; and for default of such, to the use of *William Lord Cavendish* his heirs, &c, for ever." She also gave Lord *William* a power to lease for twenty-one years; and bequeathed to him all her personal estate, in confidence that if there should remain any surplus, he would divide the same amongst his children at his discretion. And she appointed him her executor. At her decease *William Lord Cavendish*, afterwards Duke of *Devonshire*, had issue then living the said *William Lord Cavendish*, now Duke of *Devonshire*, *Richard Lord Cavendish*, and *George Lord Cavendish*, and *Dorothy* now Duchess of *Portland*. *William Lord Cavendish* entered by virtue of the said will, and remained in possession till his death. Previous to his decease, being Duke of *Devonshire*, he made his will, dated 18th

May 1763, as follows; "also I give and devise unto my brothers *George Cavendish* and *Frederick Cavendish* their heirs and assigns all such real estate, either in possession, reversion, remainder or expectancy, as I have power to dispose of, either by the will of *Dorothy Richmond* deceased, or of my own or late father's purchase, or otherwise howsoever, and also all my money which I have power to raise out of my estate, and all other personal estate of which I have not made, or shall hereafter make, any particular appointment, (except such part as I shall hereafter bequeath to my eldest son) in trust that they do pay and appropriate unto the use of my daughter *Dorothy* 30,000*l.* which I give her as a portion." He then directed them to lay out the remainder of his personal estate in land or government securities for his two younger sons, *Richard* and *George Cavendish*, in equal shares, until the younger attained twenty-one years; and then to make an equal partition, and stand seised, as to one divided moiety, to the use of the said *Richard* for life, remainder to trustees to preserve contingent remainders, with remainder to trustees for 500 years, in trust for the first and every other son of *Richard* successively in tail male, remainder to his son *George* for life, remainder to trustees to preserve contingent remainders, during the life of *George*, remainder to trustees for 500 years to the first and every other son of *George* successively in tail male; remainder to his eldest son *William Cavendish*, his heirs, &c, for ever. The like of the other divided moiety, *mutatis mutandis*. And he declared the trust of the said several terms of 500 years to be for the purpose of providing out of the said several estates, comprised within those terms, such jointure or jointures for the wife or wives which his said sons *Richard* and *George* should respectively have during the life of such wife or wives, and also such portions for the younger children of his two sons, as the trustees should think reasonable and direct; and in like manner for the daughters. The deviser *William Duke of Devonshire* died, leaving issue *William*, the present Duke, *Dorothy Duchess of Portland* (the lessors of the plaintiff,) the said *Richard Lord Cavendish*, and the defendant *Lord George Cavendish*.  
The



the person creating the power that it should be so executed ; and there being no rule of law against it, inasmuch as all the objects

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The personal estate of the said *William Duke of Devonshire* amounted to upwards of 20,000*l.* after payment of the said 30,000*l.* to the *Duchess of Portland*, which has been paid to her ; and the real estate devised to the said *Lord Richard* and *Lord George Cavendish* amounted to upwards of 2,000*l.* per annum. *Lord Richard Cavendish* is lately deceased, a bachelor. The question is whether the will of the late Duke of *Devonshire* was a good execution of the power given to him by the will of *Lady Burlington*, or to any, and what extent ?

After the argument, the Court took time to consider of the case ; and on a subsequent day in that term,

*LORD MANSFIELD*, Ch. J. delivered their opinion as follows. This ejectment is brought for the third part of lands, belonging to the late Countess of *Burlington*, claiming under her will ; the lessors of the plaintiff insisting upon the appointment being void. The question is whether the will of the late Duke of *Devonshire* is a good execution of the power given to him by *Lady Burlington*, or to any, and what extent ? *Lady Burlington* gave the Duke a power to appoint to such child or children (stating the words) ; and for want of appointment, to all, as tenants in common, in tail, with cross remainders. The Duke limited all the estates in question to his two younger sons, in strict settlement, with a power to make jointures &c. ; remainder in fee to the present Duke. A ground struck me, in considering this case, which the parties had not thought of, or adapted the case to. I have read the will, and wish you to adapt these facts. The Duke of *Devonshire* by will left great bequests to all his children ; to the present Duke mines, jewels, pictures, &c. ; to the *Duchess of Portland* 30,000*l.* ; and left his estates, charged with 20,000*l.* to the increase of the personalty. He then gave 1000*l.* per annum to each of his younger sons. At the Duke's death the children were under all age, but have since attained twenty-one. They have all taken the bequests under the will, and have enjoyed them ever since. They now object to the appointment under the will.

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1st ground ; It is not permitted to any of the parties to this cause to dispute the Duke's will, or whether he has made this appointment legally or illegally. Their mouths are shut. It is a tacit condition that every man who takes under a will is bound, not only not to dispute the will, but to maintain the title of all the rest, unless he give up every thing under it. No rule can be better established than that whoever takes under a will, unless he give up the right which he derives from it, cannot dispute other provisions of it. A most reasonable rule ; because a man makes his will, supposing the whole to stand. An old entail discovered may overturn the whole plan. Here the plaintiffs are tenants in tail under *Lady Burlington's* will, and tenants for life under the Duke's. They claim great property under the Duke's will, and have taken it. If they reject his will, they must renounce all benefit under it. Therefore they are bound to suffer a recovery, or make the title complete. That is decisive. 2dly, It is objected that the appointment, being void in part, should be void *in toto* : but as to that, we are of opinion, that if void as to the children, it is good to *Lord George* for life ; and therefore this ejectment at any rate is premature. But the last ground of consideration, and which is what the case is particularly adapted to, is whether the power was well executed. As we are all of opinion with the issue unborn, and all other parties are of age, and desire our opinion, we think for the satisfaction of the family we ought to give it, though it is not necessary. All powers must be executed according to their meaning. When a power is given to allot amongst particular objects, the party cannot give it to other objects. All the cases cited went on that ground ; whether the person giving that power meant it should be extended so far as the execution went. *Alexander v. Alexander*, 2 *Vez.* 640. is no more. *Maddison v. Andrews*, 1 *Vez.* 57. No conclusion can be drawn from *Alexander v. Alexander* that "children" may not, in some cases, be extended to "grand-children" and "great grand-children". *Wyt's v. Blackman*, 1 *Vez.* 196. shews



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of the appointment were in existence when the power was created. That case was determined by the unanimous opinion of this Court, after great deliberation. But, 2dly, If the limitations to the grand-children cannot be supported, those to the children may. If the execution of the power be bad in it's full extent, that part which is warranted by the power may be retained and supported, and the excess rejected, if the one can be distinguished from the other. It was so said in express terms by Sir T. Clarke in *Alexander v. Alexander*. And in *Zouch v. Woolston* (a), Lord Mansfield said "No doubt could ever have been made whether a man might not do less than his power, or if he did more, whether it should not be good to the extent of his power." Now here it is capable of being ascertained which part is excessive, and which within the scope of the power; that which is given to the children may be supported, and that to the grand-children rejected. What was said by Sir T. Clarke in *Alexander v. Alexander*, and by Buller, J. in *Robinson v. Hardcastle*, against this construction, is referable to the subject matter of

it may. There are three grounds from which we are of opinion that this was a good execution: 1st, from the subject matter of the power; 2dly, from the limitations over for want of appointment; 3dly, from the words in which the power is created. 1st, This is not money, nor to be turned into money, nor portions. It is a limitation of a family estate, how it shall go after her death. She considered how it should go, being determined that it should go amongst grand-children. Suppose she had only said, at the time of making her will, that she meant it to go to the grand-children; it must have been inquired whether absolutely, or in strict settlement; if so, her answer must have been "in strict settlement." There are two kinds of settlement, one by which the issue of the person to whom the first limitation is made shall certainly take, by giving the first taker only an estate for life; the other by creating an estate tail in the first instance. But then there is a trick in law, by which, when the issue arrive at twenty-one, the entail may be barred. If this had been represented to Lady Burlington, her answer would have been, that she was sorry for it, as it might be a mean of defeating her purpose: but then it would be answered to that again, that there was a trick against that to make a strict settlement. That was meant; but to guard against all events, she said "I will put the father in my

place, and give him authority, if he choose to execute it." If the words "in strict settlement" had been used, no body could have doubted her meaning. Now all the words in the language, except those, are used to carry this power as far as possible, and to shew that she meant an appointment in strict settlement. Whatever he might do with his own estate, he might do with this; that was her intention, only that the children were the objects. What is the use of powers? it implies a strict settlement, with power to make jointures, leases, and raise portions.

Partial objections have been made, which it is not material to go into; as, that the Duke of Devonshire could not take a reversion in this case; and *Alexander v. Alexander* was cited; in which case the Master of the Rolls was of opinion that a reversion could not be given. But why? because it was meant as a portion; but this was not so. Another objection was, that the power could not be delegated. That is a good maxim, but it does not apply to this case; for Lady Burlington did not fix the power of jointuring, but gave authority to the Duke to give the power. He made the power, and therefore there is no delegation. On all the grounds we are of opinion with the defendant.

(a) 2 Burr. 1147.

those



those particular cases. The first was a case of personalty; between which and realty the Court said in the *Duke of Devonshire v. Lord George Cavendish* there was a wide distinction. And in the other, an estate tail was given to the grand-children, in default of appointment. If the limitation to the first and other sons &c. of *M. Griffith* be removed, the remainder to *T. H. Griffith* for life is thereby accelerated. There are many cases in which a subsequent remainder has been supported, though the preceding one could not; *e.g.* that of a devise to a Monk. *Perk. sect. 566*. In the one case the Monk was incapable of taking; in the other, the grand-children; but the same consequence follows from both. If, under a power to appoint to children, an appointment were made to one son for life, remainder to a stranger for life, remainder to another son, the intermediate limitation would be void, and the last would take effect on the determination of the first; so in the case of an intermediate appointment to grand-children, not warranted by the power. Upon the same principle proceeded the cases of *Hodson v. Ambrose* (a); *Warner v. White* (b); and *Avelyn v. Ward* (c); in which last case Lord *Hardwicke* said (d), "I know no case of a remainder, or conditional limitation over, of a real estate, whether by way of particular estate so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, but if the precedent limitation, by what means soever, be out of the case, the subsequent limitation takes place." In *Adams v. Adams* (e) it was expressly said in the certificate, sent by this Court to Chancery, that though *Frances Adams* had exceeded her power by limiting to grand-children, yet that the limitations ought to prevail as far as her power extended; and that the limitations to her daughters for life were good: now that must mean not only the limitations of the respective moieties to the two daughters, but of the cross remainders also between them. And in the *Duke of Devonshire v. Lord Cavendish* Lord *Mansfield* said, though the limitations over were void, the life estates to Lord *Richard* and Lord *George Cavendish* were good, and that not merely as to their respective moieties but as to the cross-remainders in those moieties also. It has been objected however that the limitation to *T. H. Griffith* cannot take place, because it is a contingent remainder, depending on a prior limita-

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(a) *Dougl.* 337. 3d edit.(b) *Ib.* 344. n. 4.(c) 1 *Vez.* 420.(d) 1 *Vez.* 422.(e) *Cowp.* 657.



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tion, which is void: but the limitations to the immediate children of Mrs. Griffith are not contingent, but vested, remainders: they are vested in interest, and only wait for the dropping of the possession to vest in possession. 3dly. The doctrine of *cy pres* is not applicable here, in the manner contended for. That doctrine is originally taken from *Litt. sect. 351*; where it is said "If feoffment be made upon condition that the feoffee shall give the land to the feoffor, and to the wife of the feoffor, and to the heirs of their two bodies engendered, and for default of such issue, remainder to the right heirs of the feoffor; if the husband die, living the wife, before any estate tail made to them &c, the feoffee ought to make an estate to the wife *as near the condition, and also as near to the intent of the condition, as he may make it, &c.* to the wife for life, without impeachment of waste, remainder to the heirs of the body of her husband on her begotten, remainder to the right heirs of the husband." And the reason given why she should have an estate for life, *without impeachment of waste*, is, that "the condition was that the estate should be made to the husband and wife in tail; and if such estate had been made in the husband's life, then after the husband's death she would have had an estate in tail, which estate is without impeachment of waste." Lord Coke, in his comment on this section, puts several other instances (a); one of which is, that if A. enfeoff B. on condition that B. shall make to C. (a layman) an estate in frankalmoigne, he must make an estate to him for his life; because it is as near the condition as may be. But in neither of the instances is a larger estate given than directed: whereas if, according to the supposed doctrine of *cy pres* here, an estate tail be given to M. Griffith, the Court will give him not only a different, but a larger, estate than that created by Mrs. Griffith's will. In the two cases cited for the plaintiff the intention of the parties could not be effected in any other way than by giving estates of inheritance to the first takers. Here indeed it has been argued that it was Mrs. Griffith's intention that the subsequent estates should not take place till there was a failure of issue of M. Griffith: but, in the first place, as far as depends on intention, the Court must be guided by the intention of the person who creates the power, and not by that of him who executes it; and even if Mrs. Griffith's intention were to be resorted to, it is equally consistent with her intention that the last estates should take effect, if the former could not; because

(a) Co. Lit. 219. b.



the same will provides for all. In *Chapman v. Brown* too, it must be observed the Court did not create an estate different from that given by the devisor; for he in express terms devised an estate tail; it was "To the second son of *R. Brown* for life, and after his decease to the first son of his body and the heirs male of the body of such second son." It was there argued that some words were omitted in transcribing the will, and the Court were strongly pressed to insert them; but they thought that they had no power to give an estate which the devisor had not given; and that the words which he had used would best answer his intention: whereas here the Court by assuming such a power, in giving an estate tail to *M. Griffith*, will frustrate the intention of the parties, by overthrowing all the subsequent limitations.

In reply to the 1st point, it was said, first, that the case of the Duke of *Devonshire v. Lord George Cavendish* was distinguishable from the present, because there the words creating the power were more comprehensive than those used in this case; but 2dly, If they could not be distinguished, that case was expressly decided on another ground, namely, that none of the parties claiming under the will could dispute it; and therefore what was said by the Court respecting the appointment was unnecessary; and 3dly, That, if it had been the ground of decision, that case stood alone, as opposed to all the other cases upon the subject. And it was observed that the principle upon which the cases of *Warner v. White*, &c, were decided was more favorable to the plaintiff in this case than the defendants; because as in those it was not the intention of the devisor that the children of the first devisee should take by purchase they were excluded, since if they had taken at all they must have taken as purchasers: so here it was the intention of Doctor *Griffith* that the whole estate should be taken by his immediate children; whereas if the appointment were supported, the grand-children would take as purchasers. Nor could that class of cases govern the present, considered on the second head of argument; because, as the will only speaks from the death of the devisor, a devise to a person, who dies before the devisor, is an absolute nullity. The case too of the Monk is also inapplicable here; in order to make them like each other, the instance should be put of a devise to a Monk for life, and after his natural death to *A.B.*; in that case not only the life estate to the Monk would be void, but the subsequent remainder also, depending upon it. What was said in *Avelyn v. Ward* that if the precedent limitation, by what means soever,

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is removed, the subsequent limitation must take place, must be understood with this restriction, that the precedent limitation *could* take place; whereas here the precedent limitation to the children of *M. Griffith* never could. And with respect to the third point; the principle of the cases cited is applicable here. Those cases shew that where the general intention of the deviser can be clearly discovered, and the whole of what he has directed cannot be executed, the Court will give effect to as much as they can, consistently with the rules of law.

*The Court* took time to consider of this case; and on this day they sent the following certificates to the Court of Chancery.

This case has been argued before us by counsel, and we have considered of it. The operation of the will of *Frances Griffith* must be confined within the limits of the power given to her by her husband. He empowered her to give, devise, and bequeath, to any one or more of his child or children, in such manner, share, and proportion, as she should by her will direct and appoint.

His child or children are the only objects mentioned in the power; and we think it is clear that she could not make any other person a purchaser of any interest in the property. The whole of the execution of the power must be exhausted upon the children. The execution, which she has attempted, takes in persons who were not children of the testator, and affects to make them purchasers; and is not only not warranted by the words of the power, but might give a descendible quality to the estate to persons out of the testator's views, *viz.* to the heirs *ex parte maternâ* of the children of the sons, and *ex parte paternâ* of the children of the daughters.

But although the appointment cannot, as we conceive, take effect in the particular manner the widow intended; yet her general intention being that the children of her several children should take estates of inheritance in tail general, on the death of their respective parents, we think that that general intention should be carried into execution, as far as the power given by her husband will allow; and consequently that *Guyon Griffith* the son, and his brothers, and sisters, respectively, took estates in tail general. This construction we think fairly warranted by great authorities. *See 1 Kenyon's Decisions in P. & M. Kenyon, 54 & 55. 1 N. Grose, 332.*

In the execution of powers the material object to be attended to is the intention of the person, creating the power; and that intention

\* Hence contra  
certificates in Adams v.  
Adams (10 P. 57).  
See also as to this  
point the language  
of Mr. Justice Byles in giving the opinion in  
the case of *Robinson & Hardcastle v. Brown*  
Rep. 15 R. 25 A. But in that case the object of  
the power, namely, the children, were unborn  
at the time the power  
was created, & con-  
sequently the strict  
rule making the children tenants for life  
with rem. to trustees for sale, & then to  
grandchildren in tail, could not be intro-  
duced consistently with law.



intention is to be collected from the words of the will, or other instrument, giving the power, according to the ordinary, and common, acceptation of the words, and not according to any legal, or technical, exposition of them.

A settlement on a child for life, with remainders to his first and other sons in strict settlement, is in common parlance a settlement on the child; and the general intention of persons, who look forward to future settlements, is that the estate shall be tied up as long as the rules of law will allow.

The question is, whether the words used in this will sufficiently indicate that intent; and we are of opinion that they do. If the words "in strict settlement" had been used, the case would have admitted of no doubt: And we think the words "manner," "share" "proportion," and "transmit," are equivalent to them. The wife having a power of settling the estate among the children in such manner as she thought fit, it is as extensive as if every manner had been expressly enumerated, or the testator had said "in strict settlement, or otherwise." Besides, the word "transmit" in our judgment most naturally applies to a strict settlement, and means that the remote descendants of the testator, as far as the law allows, should take by the gift of the wife, and not by descent.

The word "children" has been held to be co-extensive with issue; and to include grand-children, and great grand-children, both in law and equity; as we find in *Wild's case*, 6 Co.; *Bendloe* 30; and 1 *Ventr.* 231. We think the intention of the testator in this case requires that construction, and that the testator used the term "children," as denoting the branches sprung from him. The expressions that it was his will and intention "that the estate called *Vawtorts*, and the other estate adjoining, should be considered as one estate," and be "transmitted entire to his family," confirm our opinion.

The case of the Duke of *Devonshire* against *Cavendish* seems to us to be in point: and the language there used by the Court was that whatever the person to whom the power was given might do with the estate if it were his own, he might do now; with this exception only, that the children were the objects.

But supposing that the estate could not, under this power, be strictly settled on the issue of the children, yet we are of opinion that *Moses Griffith* cannot make a good title to the estate.

There is *prima facie* a contradiction in the power, which first enables the wife to give to one or more of the children in such proportions

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proportions as she thought fit, and afterwards adding the restriction that the estate should not be divided but transmitted whole and intire to his heirs; for if the estate were always to remain intire, it could not be divided into different proportions. The only way of making the different parts of this power consistent, (provided the estate cannot be limited in strict settlement) is to consider the word "heirs" as applicable only to more remote descendants than the children; and to confine the wife's power of appointment to the children during their lives only; in which case whatever appointments the wife might make amongst the children, during their lives, the estate, after their deaths, would go intire to the right heir of the testator. If the testator delegated this power to the wife merely to secure the obedience of the children to her, this construction will answer the end.

In either way, we are of opinion that *Moses Griffith* takes only an estate for life in possession.

W. H. Ashburst.  
F. Buller.

*What was done  
by chancery on receiving  
the certificates in this  
case of Griffith v. Harrison  
doth not appear June 15th, 1792.  
But see the case of Roulledge  
v. Dorvil 2. Ves. Jun. 357.*

*In the words of  
Lord Ch. R. in  
the case of Roulledge  
v. Dorvil 2. Ves. Jun. 357.*

Saturday,  
June 16th.

The KING against J. MAJOR.

It is illegal  
to sell corn  
by any other  
measure  
than the Win-  
chester mea-  
sure.

THIS was a conviction on the 22 Car. 2. c. 8. s. 2. & 22 & 23 Car. 2. c. 12. s. 2. for buying corn on the 23d July 1791, at *Newport* in the *Isle of Wight*, by a bushel different from the *Winchester* measure. It appeared by the evidence set forth in the conviction that the corn was bought by the customary measure used in the *Isle of Wight*, which contains a pint more than the *Winchester* measure. The defendant was convicted in 40s; and 10l. 15s. being the value of the wheat sold.

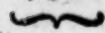
By the stat. 22 Car. 2. c. 8. s. 2. it is enacted that "if any person shall sell any sort of corn or grain, usually sold by bushel, either in open market, or any other place, by any other bushel or measure than that which is agreeable to the standard marked in his Majesty's Exchequer, commonly called the *Winchester* measure, containing eight gallons to the bushel, he shall forfeit for every such offence the sum of 40s." And by the 22 & 23 Car. 2. c. 12. s. 2. it is enacted that "Every person who shall sell (a) or buy any corn &c, in any other manner than as is directed by the said act (22 Car. 2.) shall forfeit and lose,

(a) No objection was made that the buyer this act.  
was not liable to both the penalties under



side the penalty of the former act appointed, all corn &c bought or sold contrary to the act, or the value thereof &c.

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*Bearcroft* (a), against the conviction, after observing that it did not appear that these statutes had ever been enforced, and that it was a matter of public notoriety that a customary measure was used in many parts of the kingdom, said that however they might formerly have been observed, they were virtually repealed by several modern acts of parliament; 10 *Geo.* 3. c. 39. 29 *Geo.* 3. c. 58. and 31 *Geo.* 3. c. 30; which direct returns to be made of the average price of corn, and expressly mention the customary as well as the *Winchester* measure. The 10 *Geo.* 3. c. 39. §. 1. directs justices to order weekly returns of the prices of corn to be made; and the 4th section enacts that "the justices shall cause a standard *Winchester* measure bushel of eight gallons to be provided and kept at each market town, from whence such return shall be directed to be made; and such return shall be the average prices of wheat &c, by the customary measure of each respective market, and also the average prices by the standard or *Winchester* bushel." By the 17 *Geo.* 3. c. 40. the above act is continued for seven years, and from thence to the end of the then next session of parliament. The 29 *Geo.* 3. c. 58. §. 20. after the appointment of inspectors of the prices of corn, directs millers, factors, &c, being buyers of corn for sale, to deliver to the inspector an account in writing signed by them of the quantities received by them during the week, with the prices, and by what measure or weight the same was bought, under a penalty of 10 l.; and by sect. 24. the inspectors are directed in their returns to compute the quantities of corn by the *Winchester* bushel. And by the 31 *Geo.* 3. c. 30. §. 83. every inspector is required to make a comparison between the *Winchester* measure and the measure commonly used in the city or town, for which he is appointed inspector; and within a month after his appointment to affix in some conspicuous place in the market or townhall a statement in writing of such comparison, and return a copy of the same to the receiver of corn returns. The Legislature has therefore recognized and adopted the customary, as well as the *Winchester*, measure, in these several acts; and particularly in the 29 *Geo.* 3. c. 58.; otherwise they would be requiring the buyer to criminate himself by delivering an account in writing of the corn bought by him by an illegal measure.

(a) This was argued in *Hilary* term last.



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*Marryatt, contra.* Notwithstanding it has been usual in many parts of the country to sell by a customary measure, it is illegal. The cases of *Noble v. Durell* (a), and *Hockin v. Cooke* (b), proceeded on the ground that only one measure was permitted to be used throughout the kingdom. The statutes of *Car. 2.*, which create this offence, are expressed in the most positive terms, and are not repealed by the modern acts alluded to, which were made for other purposes. All the provisions in these latter acts have one object in view, the ascertaining of the quantity of corn in the kingdom, and its price; which could not be effected by directing the returns to be made according to the measure in each particular place if those measures varied. It therefore became necessary to direct the inspectors to distinguish in their returns between the one measure and the other: but it cannot be inferred from thence that the Legislature meant to sanction the use of any different measure from that mentioned in the statutes of *Car. 2.*; but, on the contrary, the policy of abiding by those statutes is apparent even from the modern acts. The object of the statutes of *Car. 2.* was to have only one measure throughout the kingdom; the object of the modern acts was to ascertain the exact quantity of corn in the country. But as, notwithstanding the penalties inflicted by the former, persons continued to sell by different measures, the purposes of the latter acts would have been frustrated, if the Legislature had not adapted the provisions of them to the customs of the country: but still the latter acts left the persons, selling by customary measure, open to the penalties of the statutes of *Car. 2.* Neither is there any foundation for the argument that by this construction millers and factors are compelled to criminate themselves, by making a return of corn bought by customary measure; because they have the option of buying by statute measure.

*The Court* said that, as this was a question of very general concern, they would take time to consider of it.

LORD KENYON, Ch. J. Now delivered the opinion of the Court.—We have hitherto delayed giving judgment in this case, in the hopes of discovering that the farmers in general have been acting under a mistake; for it is a matter of notoriety that in different parts of the country corn is sold by different measures, some greater and others less than the *Winchester* measure. This question depends on the stat. 22 *Car. 2. c. 8.*, and the 22 and

(a) Ante 3 vol. 271.

(b) Ante 314.



23 *Car. 2. c. 12.* The former imposes a penalty of 40 s. on any person who shall sell corn, or grain, usually sold by bushel, by any other bushel or measure than the *Winchester* measure. The stat. 22 & 23 *Car. 2. c. 12.* recites the former act; and, in order to enforce it, subjects both the buyer and seller to an accumulative penalty, the value of the corn sold. These acts of parliament are expressed in the most positive terms; and it was admitted in the argument that there was no subsequent law, which directly repealed them. But several other statutes for the regulation of the corn trade were referred to, directing returns of the average price of corn to be made, and noticing in those returns a customary measure. These, it was argued, obliquely, though not directly, repealed the statutes of *Charles the Second*. We have considered this matter very fully, and are of opinion that the argument does not lead to that conclusion. We cannot get rid of those positive laws by a reference to subsequent statutes, which were passed for another purpose, and which leave the former ones still in force.

Conviction affirmed.

WILSON *against* RASTALL.

THIS action was brought to recover penalties upon the bribery act, for bribing voters at the last election for the borough of *Newark upon Trent* to vote for one of the candidates. The bribery was charged to have been committed by the defendant and his agents, among whom was one *W. Handley*. At the trial before *Thomson, B.* at the last *Nottingham* assizes *W. Handley* was called as a witness, who deposed that previous to the dissolution of parliament in the Spring of 1790 he had received letters at *Newark* from the defendant in *London*, which he had had notice to produce with his subpoena: He had them not however to produce, but gave this account of them; that as to part he had restored them to the defendant before his subpoena; as to the rest he had given them to a *Mrs. Elizabeth Handley* at her desire, with a direction to destroy them after she had read them. That he had since endeavoured to procure them again for the like purpose of destroying them, but she had refused to give them up to him again; and he knew not whether they were destroyed or not. Two of these letters related to the subject of the election. The witness was then asked the contents of these

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Monday,  
June 18th.

This Court will grant a new trial in a penal action on account of a mistake or mis-direction of the judge. If any matter be disclosed to an attorney in the cause, he cannot be permitted to give it in evidence either in that or any other action. It is the privilege of the client and not of the attorney. But such privilege is confined to counsel, solicitors, and attorneys, when acting in their respective characters.



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these letters ; but that was objected to, as Mrs. *Handley* might be called upon to produce the letters or say what was become of them ; and the objection was allowed. Mr. *B. Handley*, an attorney, was then called, who said that he had the letters in question, which he had received from Mrs. *Handley* ; and that Mr. *W. Handley* was at that time under a prosecution for bribery, and he wished to render him what assistance he could. That Mrs. *H.* had desired him to destroy the letters, but he still kept them. That there was no action now depending against Mr. *W. H.* but the two years were not yet expired. The letters were not (that he knew of) put into his hands with Mr. *W. H.*'s privity ; but he had kept them with his privity and consent. Mr. *W. H.* had indeed desired him to destroy them, but he had not done so for the same reason as he had not complied with the like request from Mrs. *H.*, namely, that he had soon after the election stated that Mr. *W. H.* acted only under the direction of Mr. *Rastall* in the election business. He further stated that he was not then concerned in carrying on any suit for *W. H.* ; that he never was attorney in any action of indemnity ; that he had been applied to by Mr. *W. H.* to be concerned, but had declined it, giving as a reason that he was under-sheriff and a material witness in the cause. That he had not employed *W. H.*'s attorney for him ; but that *W. H.* had consulted him in his profession as a confidential person ; and had applied to him both before and after he had received the letters. He had desired the witness to consult with his attorney, which he had done, as well as with *W. H.* himself. The letters were communicated to him in consequence of the defendant's consulting him professionally. The witness objected to produce the letters (a) ; and the learned judge thought he was not bound so to do. Mr. *W. Handley*, being then called up again and asked as to the contents of those letters, refused to answer the question as tending to criminate himself ; which objection was allowed by the judge. The plaintiff then went into other evidence (amongst which was parol evidence of those very letters) of the acts of bribery, which were strongly proved, and were not impeached by any contradictory evidence : The jury however found a verdict for the defendant. And a rule *nisi* was granted to shew cause why there should not be a new trial on the ground of mistake in the judge, in considering that *B. Handley* was

(a) It was understood and argued upon at the bar, and so assumed by the Court, that the objection made by the witness to the production

of the letters was on the foundation of his character of attorney, by which he conceived himself bound to withhold them.



bound by his character of attorney to withhold the letters required to be produced in evidence. But a doubt being started whether there was any instance of a new trial having been granted, where the verdict had passed for the defendant in a penal action, the Court desired that point might be looked into.

*Erskine, Dayrell, D. P. Coke, Lane, and Clarke*, shewed cause against the rule. 1st, They argued against the Court's granting a new trial, on the ground of there being no instance of it in the case of a penal action, where the verdict was for the defendant. This case falls within the same rule as criminal cases, namely, that the defendant shall not be put in jeopardy twice. An action for a penalty is in the nature of a criminal suit, and has always been so considered. It is not within the statutes of jeofails. In *Jervois* 2, T. v. *Hall* (a) which was for a penalty under the game laws, and where the judge had refused to admit a parishioner to be a witness, yet the verdict being for the defendant the Court refused to grant a new trial; Lord Ch. J. *Lee* saying that he had never known any instance of it in the case of a penal action. The same was held in *Fonnercau v. Bennet* (b) in an action on the bribery act, where the verdict was objected to as against evidence; and the Court condemned the case in 2 *Keb.* 226. where the contrary had been ruled. *Seymour* 2, T. v. *Day* (c), *Mattison* 2, T. v. *Allanston* (d), *Smith v. Frampton* (e), 5 *Com. Dig.* 135. tit. *Pleader*, (S.) new trial, *R. v. Read* (f), *Rex v. Fenwick* (g), *R. v. Praed* (h), and *R. v. Davis* (i), were cited to the same effect. The only cases in which it ever seems to have been done are such as are alluded to in *R. v. Bear* (k), where the verdict has been obtained by fraud or practice, want of notice, or the like; but never in a case like the present, where a verdict has been given for the defendant on the merits. 2dly, They contended that *B. Handley*, if not the attorney on record, stood in the same situation both to the defendant and *W. Handley*, and therefore could not be called upon to betray the confidence reposed in him, by the production of the letters in question. He described himself as the confidential professional adviser of *W. Handley*; and that it was with a view to the protection of his client that he had possessed himself of the letters; for as *W. Handley* would have been liable for any bribery com-

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(a) 1 *Wilf.* 17.(b) 3 *Wilf.* 59.(c) 2 *Stra.* 899.(d) 2 *Stra.* 1238.(e) 1 *Ld. Raym.* 62. 2 *Salk.* 644. S. C.(f) 1 *Lev.* 9.(g) 1 *Sid.* 153.(h) 4 *Burr.* 2257.(i) 1 *Show.* 336.(k) 2 *Salk.* 646. and 2 *Mod. Caf.* 207.



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mitted by him, as the agent of the defendant, his interest was directly involved in the production of those letters which were called for in order to prove such agency and fix *W. Handley's* acts upon the defendant. This privilege exists even where the witness called is not the attorney on the record: In one of *Petrie's* causes for bribery, tried a few years ago at *Salisbury*, *Reynolds* who had been *Petrie's* attorney, though not so at the time of the trial, was called to prove something that he had learned in a confidential conversation with *Petrie*, but Mr. *J. Buller* would not suffer him to give the evidence, and strongly reproached him for his anxiety to reveal the secrets of his former client. In another point of view too, *B. Handley* was bound in conscience not to produce the letters, for at the time of their delivery he had undertaken to destroy them; and as he could not keep them without a breach of confidence, he ought not to be compelled to produce them; but the letters ought to be considered as destroyed. In *Madam du Barre's* case, where trover was lately brought to recover her jewels from persons who had stolen them in *France*, and brought them over here. Lord *Kenyon* would not permit the person who had acted as interpreter between the defendants and their attorney to be examined as to the conversation which was held between them. At any rate it will be nugatory to grant a new trial for the sake of having those letters produced, because they may be destroyed in the mean time.

Lord KENYON, Ch. J. In *Madam du Barre's* case I considered the interpreter as standing in the same situation as the attorney himself; and I said at the trial "that he was the organ of the attorney."

*Mingay, Garrow, and Brough, contra*, As to the 1st point, said that there was a distinction between this and the cases cited, for all those where a new trial had been refused were either criminal cases, though short of life, such as perjury, or cases of actions on penal statutes, where the jury had decided, however wrong, upon the whole merits. But first, this was not a criminal case; penal actions having been expressly decided in *Atcheson v. Everett* (a) to be civil cases; and 2dly, here the error was in the judge, who had shut out legal evidence from the jury, and thereby deprived them of the opportunity of exercising their judgment upon the whole case; though certainly even upon this evidence the verdict ought to have been the other way. The only case which seems to militate against this

(a) *Cowp.* 382.



distinction is that of *Jervois v. Hall* (a); but that is a very short note; and it is very well known that the Court do not lean in favor of actions on the game laws. But in *Robinson & T. v. Lequesne* (b) which was upon an information on seizing certain goods for a fraudulent exportation, and verdict for defendant, though the new trial was refused on application, yet (the reporter says) it seems to be admitted, that in a case of this nature a new trial might be granted if the fact would have admitted of it; and that the plaintiffs' counsel were prepared with precedents, if they had been called upon to that purpose. So an information in nature of a *quo warranto* was considered by the Court in *Rex v. Francis* (c) as a civil proceeding; and a new trial was there granted. Again, in *King v. Pippett* (d), which was a similar action to the present, the Court set aside the non-suit, being of opinion that the judge was mistaken; and upon the same principle they ought to grant a new trial in this case, where by means of his erroneous rejection of a witness the whole matter was not laid before the jury. On the 2d ground; there is no doubt but that the witness *B. Handley* would have produced the letters if he had not been prevented by the opinion of the learned judge, who decided on the ground of *B. Handley's* being attorney to *W. Handley*, and that he could not betray the confidence reposed in him. But in the first place *W. Handley* himself expressly declared that he was not his attorney, and it is plain that he did not get possession of the letters in that character. Besides the defendant had one attorney; and if the privilege could be extended to more than one, it would be attended with great mischief in cases like the present; for then all election agents would have their mouths shut.

Lord KENYON, Ch. J. Though this motion for a new trial is an application to the discretion of the Court, it must be remembered that the discretion to be exercised on such an occasion is not a wild but a sound discretion, and to be confined within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself. And that discretion will be best exercised by not deviating from the rules laid down by our predecessors; for the practice of the Court forms the law of the Court. It has been said however

(a) 1 *Wils.* 17.(b) *Bunb.* 253.(c) *Ante*, 2 vol. 484.(d) *Ante*, 1 vol. 235.

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that if we grant a new trial in this case, we shall innovate on the practice of those who have gone before us: but that was more easily asserted than proved; for there is not a single instance where a new trial has been refused in a case where the verdict has proceeded on the mistake of the judge. Where indeed the jury have formed an opinion upon the whole case, no new trial in a penal action has been granted, though the jury have drawn a wrong conclusion: so too, in ordinary, where the damages are small, and the question too inconsiderable to be re-tried, the Court has frequently refused to send the case back to another jury. But wherever a mistake of the judge has crept in, and swayed the opinion of the jury, I do not recollect a single case in which the Court has ever refused to grant a new trial. All the cases of indictments I lay out of the case, because they are criminal cases, and are exceptions to the general rule. But I consider this as a civil action. Then what are the facts here? The evidence of *B. Handley* was rejected on account of a confidence supposed to have been reposed in him by the defendant; for the witness said the letters were delivered to him in consequence of the defendant's consulting him professionally. Therefore he was not permitted to give evidence, because it was thought that the privilege of his client prevented him. But in order to see whether or not he were privileged, it is necessary to enquire whether he was in the situation which he assumed to himself. Was *B. Handley* in a situation over whose conduct his client had an interest? It expressly appears from his own evidence that he was not, nor could be employed as an attorney. And I have always understood that the privilege of a client only extends to the case of the attorney for him; though whether or not it ought to be extended farther I am happy to think may be enquired into in this cause; for it is a matter of satisfaction to us that every step which we take may be reviewed in another court, if the defendant choose to tend a bill of exceptions; and therefore our opinion will not conclude the defendant. But in order to shew that the privilege extends beyond the case of an attorney and client, a hard case has been pressed upon our feelings, of confidence reposed in a friend. But if a friend could not reveal what was imparted to him in confidence, what is to become of many cases, even affecting life; *e. g.* Doctor *Ratcliff's* case (a). And if the privilege now claimed extended to all cases and persons, Lord *W. Russell* died by the hands of

(a) 9 St. Tr. 532.



an assassin, and not by the hands of the law; for his friend Lord *Howard* (a) was permitted to give evidence of confidential conversations between them: all good men indeed thought that he should have gone almost all lengths rather than have betrayed that confidence; but still if the privilege had extended to such a case, it was the business of the Court to interfere and prevent the evidence being given. I therefore think that this privilege is only allowed in the case of attorney and client. And it appears to me that *B. Handley* was not permitted to produce these letters on a supposition that the privilege of his client prevented him. But one ground, which has been urged against our granting a new trial on account of the non-production of these letters, is, that before the next trial they may be burned: but in *The Attorney General v. Le Merchant* it was determined that parol evidence might be given of letters, which were not produced; and that too was the case of a penal action.

BULLER, J. This doctrine of privilege was fully discussed in a case before Lord *Hardwicke*. The privilege is confined to the cases of *Counsel*, *Solicitor*, and *Attorney*; but in order to raise the privilege, it must be proved that the information, which the adverse party wishes to learn, was communicated to the witness in one of those characters; for if he be employed merely as a *steward*, he may be examined. It is indeed hard in many cases to compel a friend to disclose a confidential conversation; and I should be glad if by law such evidence could be excluded. It is a subject of just indignation where persons are anxious to reveal what has been communicated to them in a confidential manner; and in the case mentioned, where *Reynolds* who had formerly been the attorney of Mr. *Petrie*, but who was dismissed before the trial of the cause, wished to give evidence of what he knew relative to the subject *while he was concerned as the attorney*, I strongly animadverted on his conduct and would not suffer him to be examined: he had acquired his information during the time that he acted as attorney; and I thought that the privilege of not being examined to such points was the privilege of the party (b) and not of the attorney; and that that privilege never ceased at any period of time. In such a case it is not sufficient to say that the cause is at an end; the mouth of such a person is shut for ever. I take the distinction to be now well settled, that the privilege extends to those three enumerated cases at all

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times, but that it is confined to these cases only. There are cases, to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characters. This point was very much considered in *The Duchess of Kingston's* case (a), where Sir C. Hawkins, who had attended the Duchess as a medical person, made the objection himself, but was over-ruled, and compelled to give evidence against the prisoner. The question therefore here is, whether *B. Handley* were privileged with respect to any person. As to *W. Handley*, he certainly was not; for he said that the witness neither was, or could be, his attorney; because he was at that time acting as under-sheriff. Neither was he privileged as to this defendant for the same reason; and though it was said that the defendant (by *W. Handley*) consulted him in his profession as a confidential person, the meaning of that was that as *B. Handley* was more conversant with business of this kind than those who were not of his profession, *W. Handley* consulted him, but did not employ him as an attorney. But it was contended, on the part of the plaintiff, that supposing the witness were privileged in any action in which *W. Handley* was a party, the privilege did not extend to this action against *Rastall*. But to that I cannot accede; for if he were privileged, so as not to be examined to particular points in any action against *W. Handley*, he could not prove the same facts in an action against any other person. For the nature of this kind of privilege is that the attorney shall not be permitted to disclose in any action that which has been confidentially communicated to him as an attorney. However as *B. Handley* was neither the attorney of *W. Handley* or of the defendant, I am of opinion that he was improperly prevented from producing the letters in question. Then as to the other ground: I know of no case, except that of *Jervois v. Hall*, 1 *Wils.* 17., in which the Court has ever refused to grant a new trial, which was moved for on account of the mis-direction or mistake of the judge. And the note of that case in 1 *Wils.* is much too loose to be relied on. It is not stated whether or not the Court even granted a rule to shew cause; at all events the question was not agitated whether the witness, who was rejected at the trial, might or might not be examined. I think that the witness there was properly rejected, because he was

(a) 11 *St. Tr.* 243. See also the examination of Lord Barrington, page 246, 7.



interested (a). But if the Court proceeded on the ground, that the witness was a competent witness, and yet refused to grant a new trial, I think the case itself is not law. The case cited from 2 *Str.* 1238. by the defendant's counsel proves the reverse of that for which it was adduced; for there the Court refused to grant a new trial, "there being no proof of any misbehaviour in the defendant, or tampering with the jury." Now if on the existence of either of those grounds the Court would have granted a new trial, why should it not be granted where the judge falls into a mistake; because under such circumstances the cause was not fully before the jury?

GROSE, J. This case has been so fully gone into by my brothers that it is unnecessary for me to say more than that I agree with them.

Rule absolute.

(a) But now by the Stat. 27 *Geo.* 3. c. 29. a parishioner may be examined to prove an offence within the parish, though the penalty is given to the poor of the parish; unless the penalty exceed 20*l.*

GOODISSON *against* NUNN.

Tuesday,  
June 19th.

THIS was an action of debt to recover 21*l.* on certain articles of agreement, the substance of which was stated in the declaration. The defendant cravedoyer of the agreement; by which the plaintiff agreed that he would on or before the 2d of *September* then next "by such conveyances, surrenders, assurances, ways, and means in the law, shall reasonably devise advise or require (a), well and sufficiently grant sell and release assign and surrender or otherwise convey to the defendant all that copyhold tenement lying &c."; In consideration whereof the defendant covenanted to pay to the plaintiff the sum of 210*l.* on or before the 2d day of *September* next ensuing; on failure of complying with the before mentioned agreement the defendant was to pay to the plaintiff the sum of 21*l.*; and if the plaintiff did not deliver the estate according to the before mentioned agreement, then he was to pay to the defendant the sum of 21*l.* It was further agreed between the parties that the plaintiff should take up the copyhold as follows (that is to say) "that the plaintiff should take it up either for the defendant or his wife, as they should agree at the time; that the plaintiff should take it up for himself; that each party should pay share and share alike

A. agreed to sell B. his estate for a certain sum before a particular day, in consideration whereof B. agreed to pay that sum on the day, and on failure to pay 21*l.*; held that they were dependant covenants; and that A. could not recover the 21*l.* without shewing a conveyance on his part, or a tender of one.

(a) The agreement was drawn in this inaccurate manner.



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towards the expences attending the taking it up." The defendant then pleaded, 1st. *Non est factum*; 2dly, That the plaintiff did not on or before the 2d day of *September* next, &c. by such conveyances, assurances, surrenders, ways and means in the law reasonably devised, advised and required, well and sufficiently grant, sell, and release, assign and surrender, or otherwise convey to the defendant the said premises in the said articles of agreement mentioned, &c. 3dly, That the plaintiff did not on or before the 2d day of *September* &c. or at any time since well and sufficiently grant, sell, and release, assign and surrender, or otherwise convey, to the defendant, the said premises, &c. 4thly, That the plaintiff at the time of the making of the articles, &c. had nothing in the said premises, &c. whereby he could be enabled to grant, &c. to the defendant the said premises &c.

To the three last pleas the plaintiff demurred generally.

*Wood*, in support of the demurrer. The two first special pleas are drawn on a supposition that the conveyance by the plaintiff to the defendant is a condition precedent, and that the defendant is not liable on his covenant till the plaintiff has performed the covenant on his part. But, on the true construction of these articles, this was not a condition precedent on the plaintiff's part, but the covenants were mutual and independant; a breach of either of which gives the other party a right of action. If it had been agreed "that the defendant would on a particular day pay the money upon the plaintiff's conveying," that would have made the conveyance a condition precedent to the payment of the money. But here the parties have relied on the mutual covenants which each entered into with the other. Those covenants are general, not depending upon each other. The first is that the plaintiff shall convey &c., expressed in the most general terms; *in consideration whereof* (that is, in consideration of the plaintiff's covenant) the defendant covenanted to pay, &c. in terms equally general. In 1 *Roll. Abr.* 415. *pl.* 8. "If by articles of agreement between *B.* and *C.*, by which *B.* covenants, for the consideration afterwards to be expressed, to convey certain lands to *C.* in fee; and after *C.* covenants on his part, *for the consideration aforesaid*, to pay *B.* 160*L.* in this case although *B.* does not assure the land to *C.*, still *C.* is bound to pay the money; for the assurance of the land is not a condition precedent; but they are distinct and mutual covenants."



nants." So in *Pordage v. Cole* (a), the plaintiff declared on a specialty, by which it was agreed that the defendant should give the plaintiff 775 *l.* for all his lands &c.; that the defendant had given the plaintiff 5*s.* as earnest; and that it was also agreed that the defendant should pay the plaintiff the residue of the 775 *l.* at a certain time; and the breach was the non-payment of that residue: to this the defendant demurred, and objected that the plaintiff had not averred a conveyance on his part, or a tender of one; and there too the word "*pro*" was used; which, it was said in *Co. Lit.* 204. *a*, makes a condition in matters executory: but it was held that the action was well brought; and that, if the plaintiff did not convey, the defendant had his remedy against him on the covenant. Again in *Blackwell v. Nash* (b) the plaintiff declared that he covenanted to transfer to the defendant at a certain time so much stock, and that the defendant, *in consideration of the premises*, covenanted to accept and pay for it; he then averred that he was ready and offered to transfer to the defendant, who refused to accept or pay &c.: on demurrer it was objected that *for it* made a condition precedent, and that the plaintiff should have shewn an actual transfer of the stock: to which it was answered that they were mutual covenants, and that the plaintiff need not shew a performance on his part; and it was held that *in consideration of the premises* was in consideration of the covenant to transfer, and not of an actual transferring, for which the defendant had his remedy." [In answer to a question from the Court, whether this case could be distinguished from the late cases of *Kingston v. Preston* (c), *Jones v. Barclay* (d), and *Lord Alborough v. Lord Newhaven* (e), where the rule was established, that when two acts are to be done at the same time, neither party can maintain an action, without shewing performance, or an offer to perform, on his part; which rule applied to all cases of sale; he said,] This case may be distinguished from those; because here the conveyance was to be such as the defendant should require: the words are "by such conveyances &c, shall reasonably devise, advise, or require;" which evidently mean such as the defendant should wish. The first act was therefore, to be done by the vendee, who should have directed what conveyance he wished to have. And by another part of the agreement the plaintiff was to take up the copyhold either for the defendant or his wife,

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(a) 1 *Saund.* 319.(b) 1 *Str.* 535.(c) *Dougl.* 688. 3d edit.(d) *Ib.* 684.(e) *Mich.* 21 *Geo.* 3. *B. R.*



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as they should agree: then they should first have elected to whom it should be made. Now if the first act were to be done by the defendant, this case differs from those alluded to.

LORD KENYON, Ch. J. This case is extremely clear, whether considered on principles of strict law, or of common justice. The plaintiff engaged to sell an estate to the defendant, in consideration of which the defendant undertook to pay 210*l.*; and, if he did not carry the contract into execution, he was to pay 21*l.* And now not having conveyed his estate, or offered to do so, or taken any one step towards it, the plaintiff has brought this action for the penalty. Suppose the purchase-money of an estate was 40,000*l.* it would be absurd to say that the purchaser might enforce a conveyance without payment, and compel the seller to have recourse to him, who perhaps might be an insolvent person. The old cases, cited by the plaintiff's counsel, have been accurately stated; but the determinations in them outrage common sense. I admit the principle on which they profess to go: but I think that the judges misapplied that principle. It is admitted in them all that where they are dependant covenants, no action will lie by one party unless he have performed, or offered to perform, his covenant. Then the question is whether these are, or are not, dependant covenants? I think they are; the one is to depend on the other; when the one party conveyed his estate he was to receive the purchase money; and when the other parted with his money he was to have the estate. They were reciprocal acts to be performed by each other at the same time. It seems from the case in *Strange* that the judges were surprised at the old decisions; and in order to get rid of the difficulty, they said that a tender and refusal would amount to a performance: it is true they went farther and said that "in consideration of the premises" meant only in consideration of the covenant to transfer, and not in consideration of the actual transferring of the stock: but to the latter part of that judgment I cannot accede. It is our duty, when we see that principles of law have been misapplied in any case, to overrule it. The principle is admitted in all the cases alluded to that, if they be dependant covenants, performance or the offer to perform must be pleaded on the one part, in order to found the action against the other. The mistake has been in the misapplication of that principle in the cases cited. And I am glad to find that the old cases have been over-ruled; and that we are

now



now warranted by precedent as well as by principle to say that this action cannot be maintained.

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BULLER, J. The agreement was that the plaintiff should sell his estate, and that the defendant should buy it. In the nature of the thing therefore the two acts are to be done together. In *Kingston v. Preston* (a) Lord Mansfield said "The construction contended for is, that in spite of his teeth the defendant shall be obliged to give personal credit to the plaintiff; whereas the essence of the agreement was, that neither should trust the other personally." The next case was *Jones v. Barclay* (b); there the plaintiff, who was the seller, stated that he had offered to assign and to execute and deliver a general release, and had tendered a draft of an assignment and release, and offered to execute and deliver such assignment, but that the defendant had absolutely discharged him from executing the same, or any assignment and release whatsoever. The effect of that was to put an end to the contract; and therefore it was held that the plaintiff was intitled to damages; Lord Mansfield saying "that the plaintiff had done every thing in his power to perform the agreement, and that the defendant only had been guilty of the neglect." Then followed the case of Lord Aldborough v. Lord Newhaven, in which it was said that the plaintiff must shew either that he had assigned the house, or that he had tendered an assignment, before he could insist on payment, because both acts were to be done at the same time. And in truth if there had been no case in opposition to the ancient ones, I should not have been afraid of making a precedent, the principle on which our decision is founded being universally admitted in all the cases. A distinction however has been made between this case and those of *Kingston v. Preston* &c, by saying that the defendant was to do the first act here, namely, to elect to whom the estate should be conveyed, whether to him or his wife: but there is no foundation for this distinction; for the first act was to be done by the plaintiff; the words are "the said R. Goodisson shall take it up for himself:" he was first to be admitted, before he could surrender to the defendant.

GROSE, J. In a case in *Hobart* (c) there is a good deal of comment on the word "*pro*", shewing in what cases it operates as a condition precedent, and where it does not. But notwithstanding some of the old authorities, the Courts of later times have considered whether in reality the first act is not to be per-

(a) *Dougl.* 688. 3d edition. (b) *Dougl.* 684. 3d edition. (c) *Vide Hob.* 41.

formed



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formed by the seller, or at least whether they are not concurrent acts. There is so much good sense in the later decisions, that it is too much to say that they are not law. There being several precedents in support of our decision, and those being founded in good sense and justice, I think we ought to take advantage of them.

Judgment for the defendant.

*Gibbs*, who was to have argued for the defendant, mentioned the case of the Duke of St. Alban's v. Shore, *H. Bl. Rep.* 270; and *Boone v. Eyre*, there cited.

Tuesday,  
June 19th.

## GILCHRIST against BROWN.

A feme covert, living in adultery, and separate from her husband, cannot be sued as a feme sole, if she have no separate maintenance.

**A**SSUMPSIT for goods sold; work and labour &c. Plea, that the defendant, who is sued by the name of *Brown*, at the time of the promises, was, and yet is covert of, and married to, one *J. Timmifs*, who is now living. Replication, that the defendant before the making of the said promises, and whilst she was married to *Timmifs*, committed the crime of adultery; that afterwards and before the making of the promises &c. *Timmifs* was separated from bed, board, and co-habitation with the defendant; that the defendant hath ever since lived, and still doth live, separate and apart from *Timmifs*, in adultery; and that whilst she so lived separate she made the promises on her own separate credit and account, in manner of a *feme sole*, and not on the credit or account of her husband. To this there was a special demurrer, assigning for cause that the plaintiff in his replication endeavoured to put in issue matter wholly immaterial and inconclusive; that the plaintiff alleged that the defendant was separated from her husband &c, and introduced matter foreign to the plea, immaterial to the question, and matter on which the defendant could not take issue, &c.

When this case was called on

The Court asked *Baldwin*, who was to have supported the replication, whether there was any determination to warrant it; and, on his answering that there was no case precisely similar to the present, they said that this replication could not be supported, for that it was destitute of the principle upon which all the late decisions (a) have proceeded, in which it has been held that a

(a) *Vide Corbett v. Poelnitz*, ante 1 vol. Cas. 377; *H. Bl. Rep.* 334. S.C.; and the 5.; and *Compton v. Collinson*, 2 Bro. Ch. cases there cited.

feme



feme covert may be sued as a feme sole, namely, a separate maintenance. And therefore they gave

Judgment for the defendant.

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against  
BROWN.

HUMPAGE *against* ROWLEY.

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**T**HIS was an issue directed by the Court of Chancery, which the defendant was desirous of trying, but which (it was suggested) the plaintiff wished to delay. And on that ground

*Gibbs* moved that the defendant might be at liberty to carry the record down to trial at the next assizes, observing that by the common law the defendant could not carry it down by proviso.

*The Court* thought the application reasonable, and granted the rule absolute in the first instance; saying that the plaintiff would not be damnified by it, for that if he chose to take the record down himself, the costs of this application must be paid by the defendant.

Rule absolute.

The Court will permit a defendant to carry a record of an issue, directed by chancery, down to trial, on a suggestion that the plaintiff intends to delay it.

The KING *against* J. JEFFERIES.

Wednesday,  
June 20th.

**T**HE defendant appealed to the *Gloucester* sessions against the following conviction, which was there affirmed; "County of *Gloucester*, to wit, Be it remembered, That on the 21st day of *September* 1791, at *Dodington* in the county of *Gloucester*, *E. Hathway* came before me *Sir W. Codrington Bart.* one of his majesty's justices of the peace for the said county, residing near the place where the offence was committed, and informed me that *James Jefferies* of *Ec*, on the 19th of this instant *September* in the parish of *Siston* aforesaid, did use a certain dog called a greyhound for the taking or destruction of game, and did thereby and therewith take kill and destroy a hare; and did also thereby and therewith on the same 19th day of *September*, at *Siston* aforesaid, endeavour to take kill and destroy one other hare, without having the certificate required by law for that purpose; whereupon the said *James Jefferies*, after being duly summoned to answer the said charge appeared before me, and having heard the charge contained in the said information, declared he was not guilty of the said offence: but the same being

If a conviction under the 31 Geo. 3. c. 21. s. 4. which enacts that all convictions against that act may be made out "in the form, or to the effect, following," (giving the form) contain all the substantial parts of that prescribed, it is good, though it also contain something more; for surplusage will not vitiate a conviction.



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fully proved upon the oaths of *W. Ray* and *F. Thompson*, two credible witnesses, and it manifestly appearing to me that the said *James Jefferies* is guilty of the said offence charged upon him in the said information, I do therefore hereby convict him of the offence aforesaid; and do declare and adjudge that he the said *James Jefferies* hath forfeited the sum of 20*l.* of lawful money &c, for the offence aforesaid; according to the form of the statute in that case made and provided; given under my hand and seal &c."

*Palmer* objected that this conviction was neither good as a conviction at common law, because the evidence was not set forth, nor under the statute 31 *Geo.* 3. c. 21. s. 4., which gives a summary form, different from the present. But this is drawn according to the form prescribed by the 25 *Geo.* 3. c. 50., which is expressly repealed by the 31 *Geo.* 3. c. 21.

*Burrough*, *contra*, insisted that the conviction might be supported under the 31 *Geo.* 3. c. 21. s. 4., which enacts that all convictions upon any offence against that act or the 25 *Geo.* 3. shall be made out "in the form, or to the effect, following &c," and then gives the form. Now this conviction is according to the effect of that form prescribed; for it states every thing required by that form; and the only objection to it (if any) is that the magistrate has stated more than he need have done, namely, the information, the summons, the defendant's appearance, and the names of the witnesses. But it was unnecessary to state this; and in *R. v. S. Hall* (a) it was held that surplusage in a conviction would not vitiate it.

*Palmer* in reply. It is absurd to say that, after the Legislature have repealed one form and adopted another, the former should still be supported. The Legislature in repealing one and prescribing another form must have considered that there was some difference between them; and there is this manifest difference; the term "duly convicted" is substituted in the last form in lieu of every other requisite. But here the justice has not stated that the defendant was "duly convicted" in general terms; he has chosen to state his reasons for convicting the defendant, and those reasons will not warrant the conclusion which he has drawn, because there is no evidence to support it.

Lord KENYON, Ch. J. There is no doubt but that this is a faulty conviction at common law, for the reason given. If any particular form had been prescribed, as indispensibly ne-

(a) Ante 1 vol. 320.



cessary, it must have been strictly complied with. But this act of parliament has enabled the magistrate to draw up the conviction "in the form, or to the effect, following." And it appears by the form, which is immediately subjoined, that neither the case or the evidence need be stated. The question therefore is whether the conviction, now returned to us, be not to the effect stated in the act? I think that it is; for it contains every thing that is important in the form given, and something more. It states the information, the summons, the defendant's appearance, the examination of witnesses, but not the evidence itself: but the act says that the conviction need not contain the evidence. The want of the very thing, which the statute says need not be done, constitutes the objection. I think that the magistrate has done every thing that was required; and he has stated something more in the conviction: but that will not vitiate it.

BULLER, J. The words are "I hereby convict him &c;" which must be taken to mean "duly convicted." This conviction is according to the effect of that which is given by the act.

GROSE J. The words of the convicting part go further; "I hereby convict him of the offence aforesaid; and declare and adjudge that he hath forfeited &c." This can only be a "due conviction."

*Dauncey*, who was also against the conviction, afterwards suggested that there was another objection, in not stating the offence. That in the form given by the act a blank was left, in which the offence was to be described; but that here the justice had only stated the "offence aforesaid," and that there was no offence before mentioned in the convicting part. But

*Per Curiam*. "The offence aforesaid" refers to that mentioned in the information, where it is particularly set forth.

Conviction affirmed.

The KING *against* The Inhabitants of DITCHINGHAM.

Wednesday,  
June 20th.

TWO justices removed *Hannab Cook* from *Baddingham* in *Suffolk* to *Ditchingham* in *Norfolk*; and the sessions confirmed the order of justices, and stated this case.

*H. Cook* was born in *Baddingham*, where she lived with her father and mother, who belonged to that parish, till she was seven, or eight, years old; when she was placed out by the parish

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fish officers of *Baddingham* at a general parish meeting to *R. Fisher* a farmer in *Baddingham*, under the following agreement, which was written on a leaf of the parish book, together with several other agreements of the same sort, namely, "*August 7th, 1774,—At a general parish meeting, held at the parish of Baddingham this day, it is agreed that R. Fisher shall take H. Cook and maintain her after the manner of an apprentice, with washing, lodging, clothing &c, from this day until Michaelmas 1780; R. Fisher to have 20 l. with her, and at the expiration of the said time to double clothe her; witness my hand, R. Fisher.*"—This agreement was not stamped. In pursuance of that agreement the pauper went to live with *Fisher* at *Baddingham*, and served him one year. *Fisher* then took a farm at *Ditchingham*, to which he removed, and carried the pauper with him; where the pauper lived one year and an half, during which time he found her necessary clothing, lodging, washing &c. At the expiration of the year and an half the father (at *Fisher's* desire,) took the pauper home with him to *Baddingham*; where she continued till this removal; and she has done no subsequent act to gain a settlement. *Fisher* never paid the pauper any money as wages, but upon her quitting his service gave her a double suit of clothes according to his agreement.

*Alderson* was to have argued in support of the order of sessions; and

*Hay, contra.* But

*The Court* thought the point too clear to be discussed. They said that though a modern act of parliament (a) had dispensed with the necessity of having the deed of apprenticeship indented, it was still necessary that the binding should be by deed (b). And that the service as an apprentice could not be converted into a service as an hired servant.

Order of sessions quashed (c).

(a) 31 Geo. 2. c. 11.

(b) By 3 W. c. 11. s. 8. "If any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement." By 31 Geo. 2. c. 11. s. 1. "No person who shall be bound

an apprentice by any deed, writing, or contract, not indented, being first legally stamped, shall be liable to be removed &c."

(c) See *R. v. Stratton*, Burr. S. C. 272; *R. v. Mawman*; *ib.* 290; *R. v. All Saints in Hereford*, *ib.* 656; and *R. v. Kingswear*, *ib.* 839.



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## The KING against S. WHITE and Others.

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*SAMUEL White*, merchant, *Ann White*, widow, *John Lander*, esq. *Thomas Langbarne*, esq. *William Corben*, *Robert Daw*, and *William Stanfmore*, inhabitants in the parish of *St. James*, in the town and county of *Poole*, appealed against a rate or assessment made for the relief of the poor of that parish, dated the 10th day of *December* 1791, alleging that neither they or either of them had any property liable to be rated &c. It appeared on the rate that it was a rate of 1 *d.* in the pound on all lands, and 3 *d.* for every 100 *l.* of personalty. It was proved that it was usual in that parish to rate the inhabitants towards the relief of the poor for their personal property within the parish, in the following proportion, viz. on a calculation that every 100 *l.* of which any inhabitant was possessed did or might produce interest to the amount of 3 *l. per annum*, such interest of 3 *l. per cent. per annum* being considered as a test of the ability of such person; and such person is charged in the sum of 1 *d.* for each pound of such supposed interest. That it was usual also within the parish to rate all officers in the army, navy, customs, or excise, being inhabitants of the parish, according to a supposed ability arising from their several and respective salaries. *Samuel White* was rated according to the proportion before stated in the sum of 13,500 *l.* for his personal property, which consisted of certain ships or vessels employed in carrying on the *Newfoundland* trade from the port of *Poole*, in the parish of *St. James* in the town and county of *Poole*, and monies vested on real securities, the lands on which the same were charged lying out of the parish of *St. James*. *Ann White* widow was assessed for her personal property within the parish in the sum of 1000 *l.* according to the proportion before stated; such personal property consisting of principal money to that amount. *John Lander* was rated for his personal property in the sum of 200 *l.* He was collector of the customs payable at the port of *Poole*; he had no personal property, except his salary, payable to him as such collector, and which he received by an order of the commissioners of his majesty's customs in the parish of *St. James*. *Thomas Langbarne* was assessed for his personal property in the sum of 100 *l.* He

Ships are rateable to the poor in the parish, to which they belong; so is stock in trade: But household furniture is not. Neither is money whether at interest or not; nor the pay of officers in the navy, or of merchants' ships; nor the salaries of officers of the customs, or of merchants' clerks.



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was a captain in his majesty's navy, and had no other personal property but his pay, as captain in the navy, which was paid to his agent in *London* for his use, and the household goods and furniture of the house in which he lived in the parish of St. James. *William Corben* was rated for his personal property in the sum of 100*l.* He was a clerk to a merchant then an inhabitant of the parish, and had no personal property except his pay as such clerk, and which he received from *James Neave* merchant in the parish. *Robert Daw* was rated for his personal property in the sum of 100*l.* He was master of a merchant vessel trading from the port of *Poole* to other parts, and had no personal property but his pay, which he earned as such master of a vessel, and which he received from Messrs. *B. Lester* and Co. in the parish of St. James. *William Stanfmore* was rated for his personal property in the sum of 300*l.*; such personal property consisting of stock in trade as a shopkeeper. The court of quarter sessions, on hearing the above appeal, were of opinion that all and every of the above named appellants were severally and respectively liable to be rated, and therefore confirmed the rate, subject nevertheless to the opinion of this court, whether the appellants or either of them ought to have been assessed; and if this court should be of opinion that *Samuel White* ought not to be rated, then the court of quarter sessions ordered and adjudged that the rate should be amended, by striking out his name; and so of the rest. And the court of quarter sessions confirmed the rate in all other respects.

*Bearcroft* and *Gibbs* in support of the order of sessions. 1st. As to the case of *Samuel White* rated for his personal property, partly consisting of ships trading from *Poole* to *Newfoundland*, and partly of money vested in real securities, the lands to secure which lie out of the parish;—For some time it was doubted how far personal property was rateable under the statute 43 *Eliz.* but that doubt has been long since got over; and it is now settled that personal property is rateable within the words and meaning of the statute. The true criterion is the ability of the party to contribute to the maintenance of the poor. That ability is as well to be estimated by his personal, as his real, property; although it may be more difficult to the parish to ascertain the former. But it may be objected that where property is moveable in its nature, it cannot be determined to be property



in one parish rather than in another. But it ought to be considered as being in that parish where the beneficial interest of it is received, where it yields any such; or if it do not, then where the property is deposited in specie. With respect to the ships; no doubt can be entertained but that they are personal property yielding a beneficial interest in the parish, as well as stock in trade; for there the profits of the voyage are received; and that is their only home. No other parish can claim the right of taxing them. With respect to the real securities; the land is a collateral pledge; the person of the debtor is the first security; the money vested on these is still a personal debt; this it is well known always follows the person of the creditor; and therefore as he is domiciled in this parish, his personal debts must also be considered as in the same parish. It is true some difficulty might arise where the party dwells in more than one parish in the course of the year; but that merely relates to the *quantum* for which he ought to be rated in each, which, in the case of productive personal property like this, ought to be ascertained by the interest which is received in each parish; and at any rate that difficulty does not occur here; because for ought appears to the contrary the party never resided out of the parish, and all the interest of the money was received in it. Another objection which may be started is the difficulty of ascertaining the amount of a man's personal property, the surplus of which only can be rated after payment of his debts: But to that it is sufficient to answer that where the parish can fix a party with the ostensible possession of so much personal property, if he object to the *quantum*, it lies upon him to prove the excess of value by proof of his debts in diminution of the sum assessed. Besides, if this party be rateable at all for any part of the property, the rate must be affirmed generally; for the Court will not enter into the question of *quantum*.

*Ann White's* case will turn upon much of the reasoning urged in the preceding case, with respect to the criterion of ability, of which there cannot be a more certain proof than the possession of money in specie. And this case is stronger than that of the real securities; for, by the finding that this money was actually *in the parish*, one great difficulty which attended the other case is removed; and it cannot now be disputed but that personal property, *visible in the parish*, as this must be allowed to be, is rateable. Nor is it any objection that it may be removed out of

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of the parish; for the same argument would apply against rating ships or stock in trade.

As to the case of *John Lander*, who was rated for his salary as collector of the customs, the Court being of opinion that there was no ground to support it, and that, as the question had been before decided, it ought now to be considered as at rest, it was not pressed in argument.

The case of *Thomas Langbarne*, captain of the navy, rated for his pay as such, was considered as standing on the same footing as the last, and therefore abandoned as to that point. But it was suggested that his household furniture was a proof of his ability, and being personal property, visible in the parish, he was rateable for that.

*William Corbin's* case was considered as governed by the former case of the collector: as was also

*Robert Daw's* case.

The case of *William Stanmore*, who was rated for his stock in trade, the Court said could not be disputed.

*Morris and Bond, contra*, conceived there were but four questions left. 1st. The real securities. 2d. The money. 3d. The ships. 4th. The furniture.

1. As to the real securities; two objections arise against rating the party in respect of these. The paper in itself cannot be considered as valuable property; it is only valuable as it relates to the land out of which the payment is to be made. Now 1st. That land is out of the parish, and therefore not rateable. In 2 *Bulstr.* 354: it is said that property, to be rated, must be visible and local within the parish. 2dly. If it were to be rated in respect to the securities upon it, the same property would be rated twice; once as land in the parish where it lies, and again as personal property in the parish where the securities are. But if it cannot be twice rated in the same parish, supposing the securities to be where the land is, it cannot be so rated because they are in another parish. And the Court may draw the line between the rate for the securities and the ships of *S. White*, if the latter should be held rateable; for though it be generally true that if the party be liable to be rated, this Court will not go into the *quantum*, yet that rule is not applicable here, where the party is rated for two distinct species of property. 2. As to the money; nothing can be rated which is not productive, and this money, not being stated to be out at interest, cannot be taken to be so.

But



But in no event can money be rated; because it would lead to dangerous and inconvenient consequences to oblige parties to come forward and disclose all their debts; and it is admitted that only the surplus after payment of debts is rateable. It is also a strong additional reason for saying that it is not rateable, because it never has been attempted to be rated before; and if liable to be rated in this parish, it is equally so in every parish where the owner may happen to take it in his pocket. But property is not rateable in a parish merely because it is visible there; it must be locally situated in that parish. It was held in *R. v. Hill (a)* (*Bradford Parish*) that, though stock in trade was rateable, money was not.

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3. As to the ships, the latter argument may also be applied to them: they cannot from their nature be said to be locally situated in the parish. And many inconveniences would arise from considering this species of property subject to be rated; as in the case of coasting vessels, which pass and repass between different parishes, and, if rateable at all, would subject the owners to be rated in each parish. It ought also to be considered, that this species of property, so far from being in itself of a beneficial nature, is liable to very heavy expences in repairs and other casualties, and is more in the nature of an adventure, which has been held not rateable.

4. Furniture also is an expence to the owner. It is the mean by which he occupies, not by which he gains his livelihood; a man might as well be rated for the food he eats, or the clothes he wears.

LORD KENYON, Ch. J. This is a question of great difficulty, and of vast importance to the Public. The statute of *Elizabeth* was passed to enforce (what are called) duties of imperfect obligation. For it was a duty, before that statute was made, to relieve the poor and necessitous. And the provisions of that act were adapted to the enforcing of those duties in the only way in which they could be enforced, namely, by raising a fund from persons who are deemed competent to pay it; and in the case in *Bulstrode* it was said that the rate should be on persons in respect of visible property, locally situated within the parish. Then apply that rule to these cases. First, as to the ships; I think that they are rateable; this parish is their home, and must be so considered for the purposes of the register act (b). With regard to the money lent on real securities, I think that it

(a) *Corp.* 613.(b) 26 *Geo.* 3. c. 60.



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cannot be rated; for it is stated that the money was lent by persons out of this parish on landed securities elsewhere. This therefore is not personal property in the parish; and I am not prepared to obviate the difficulty of such a person residing in two parishes. In the act of parliament which imposes a tax on horses and servants, the Legislature have guarded against this difficulty, by directing the person, liable to the duties, to give an account to the collector of the number for which he pays in any other parish: but there is no such provision for this case. I have doubted a great deal, in the course of the argument, on the case of the person rated for 1000*l.* in specie: but the inclination of my opinion is that she is rateable for this, because it is stated to be property within the parish, and it may be productive, if the owner chuse. For the same reason I think that the household furniture is not rateable, because it produces nothing; the party might as well have been taxed for his clothes: for a house indeed the occupier must be taxed, because the Legislature have said so in express terms. The case of the stock in trade is admitted to be rateable. But the cases of the salaries have been long at rest: those are not the subject of a rate.

BULLER, J. I concur with my Lord in all the points, except that relative to the 1000*l.*; for which I think the owner is not rateable. The reason for which it was admitted that household furniture is not rateable, namely, because it does not produce any profit, must also govern this: it is stated that the owner has it in hard money, and therefore we must take it, upon this state of the case, that it does not produce profit. In the next place, I am of opinion that money is not rateable within this act of parliament. The Legislature could not intend that enquiry should be made as to every guinea which a man has in his pocket. If the rate be confined to visible property yielding profit in the parish, there will be no difficulty in adhering to that rule; but it will be dangerous in the extreme to extend it farther, and to look into every man's bureau to see what money he has there. But at all events I think that this person cannot be rated, for the reason first given.

GROSE, J. I have no difficulty upon the question respecting the ships; they are rateable, like stock in trade. But the party cannot be rated for the money at interest. And as to the 1000*l.* not at interest; I have had great doubts in my mind. But, after consideration, I agree with my brother Buller, that the



Legislature did not intend to rate money. The act of parliament has enumerated all the different species of property, which should be the subject of a rate, but has omitted money. Besides which, considering how much this statute has been at different times discussed, and that it has never been held that money is rateable under it, I am satisfied that this is the true construction of the act. For though, generally speaking, usage contrary to an act of parliament cannot bind us in construing it, the not rating money shews what has been the opinion of the Profession upon this subject.

Lord KENYON, Ch. J. then said that he thought there was great weight in the reasons urged by his brethren against rating money; that he had himself expressed great doubts of his own opinion; and that he was therefore glad that that part of the rate would be quashed by the opinion of the Court. And on a subsequent day his Lordship mentioned an expression of *Yates, J.*, upon the subject of rating personal property, in a case in *Hil.* 1769, which was not taken notice of by Sir *J. Burrow* in his report of it; "If personal property be rateable, it is not to be done at random, and to leave the party rated to get off as he can: but the officer making the rate must be able to support what he has done by evidence. And no personal property can be rated, but the clear liquidated surplus, after paying all his debts."

The Court ordered the rate to be confirmed as to the ships and stock in trade, and amended as to the other points.

The KING *against* J. SHARPLES.

Wednesday,  
June 20th.

THE defendant, having been indicted at the sessions for the borough of *Lancaster* for exercising his trade as a farrier at *Lancaster*, being a foreigner, and not having made any composition with the mayor and bailiffs of the borough for his freedom within the borough, contrary to the laws, customs, and constitutions of the borough, and against the peace &c, removed the indictment into this court, and demurred to it.

It is not an indictable offence to exercise a trade in a borough contrary to the bye-laws of that borough.

The Court, without argument, were clearly of opinion that this was not an indictable offence, it not being an offence contrary to the general laws of the land; and gave

Judgment for the defendant.

*Chambre*, for the Crown, acknowledged he could not support it.

*Fitzgerald* for the defendant.



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Wednesday,  
June 20th.The KING *against* J. BURDER.

An appointment of an overseer of the poor for the year next ensuing will be understood to be for the overseer's year. Indictment, that defendant was appointed "overseer of the poor of the parish of A." and that he afterwards refused "to take the said office of overseer of the parish to which he was so appointed", good on demurrer.

THIS indictment alleged that the defendant, and another, being substantial householders in *Finchingfield*, in *Essex*, were on the 26th of *April* 1791 appointed by two justices of the county to be "overseers of the poor of the said parish for one year then next ensuing"; that the defendant had due notice &c; but that he unlawfully and contemptuously neglected and refused to take upon himself the execution of *the said office of overseer of the same parish*, to which he was so nominated, &c. To this there was a general demurrer.

*Walton*, in support of the demurrer, made two objections to the indictment; first, that it did not charge the defendant with any offence; it only stated his refusal to take upon him the office of overseer of the parish, which was not an office known to the law; it should have been "overseer of the poor of the parish"; 2dly, that he was appointed for "the year then next ensuing"; not for the "overseer's year," or "for a year," or "until another should be appointed"; so that he might continue in office longer than the regular time. But

*The Court* thought there was no weight in either of the objections. That it appeared upon the former part of the indictment that the defendant was appointed to be overseer of the poor of the parish; and that, though the part, which charged the refusal, omitted the words "of the poor", it mentioned the *said office, to which he was so appointed*, which must necessarily refer to the office of overseer of the poor. And that the appointment "for the year then next ensuing" must be understood to be "for the overseer's year (a)."

Judgment for the King.

(a) *Vid. R. v. Stubbs*, ante 2 vol. 396. n. a.; and *R. v. Sparrow*, *Bott* 11.

Thursday,  
June 21st.The KING *against* T. HOLBECHE, Esq; and Another.

County justices cannot rate a parish within their jurisdiction, in aid of another parish, lying within a borough, which has an exclusive jurisdiction.

THIS rule, calling on the defendants, two justices of the county of *Worcester*, to shew cause why a *mandamus* should not issue, commanding them to tax, rate, and assess, some parish within the hundred of *Halfshire* in the said county, in aid of

the



the inhabitants of that part of the parish of *Dodderbill* which lies in the borough of *Droitwich* in the said hundred and county to the support of their poor, was founded on affidavits which disclosed the following facts. Part of *Dodderbill* parish is within the borough of *Droitwich* and part without, but within the county of *Worcester*. That part, which lies within the borough, has immemorially maintained its own poor, and had distinct overseers. The whole of the parish of *Dodderbill* and the borough are within the hundred of *Halfshire*, in which division the defendants live and act. The particular circumstances of the place were set forth, from whence the parties making the application inferred that they were in a situation to require the assistance prayed for; the poor-rates now amounting to 25 s. in the pound, and being gradually on the encrease, from certain salt-works being discontinued there; and it was also said that the part of *Dodderbill* parish out of the borough and the other parishes in *Halfshire* out of the borough were moderately assessed for the support of their respective poor. In the defendant's affidavits in answer, it was said that they had refused to interfere because the borough of *Droitwich* is an exclusive jurisdiction, having justices of its own, to the exclusion of the magistrates of the county; and that there were, besides this part of *Dodderbill*, three other parishes in *Droitwich*, where the poor-rates are lower than in the adjacent parishes.

*Erskine*, and *Parke*, shewed cause against this rule on four grounds. 1st. The *mandamus* prayed for is to compel the defendants to do the act: but, as it is discretionary in them, the application should only have been for a *mandamus* to command them to hear the complaint. 2dly. The form of the rule is wrong; it should not be to tax any other *parish*; the words of the stat. 43 *Eliz.* c. 2. being that "the two justices shall and may tax, rate, and assess, *any other* of other parishes, or out of any parish, within the hundred &c;" and those words have been held to mean *any individuals* of a parish, and not the whole parish. 1 *Ventr.* 350. 3dly. The defendants have no jurisdiction in this case: they cannot interfere in any part of the borough of *Droitwich*, the borough justices having an exclusive jurisdiction of their own. And by the 8th section of the 43 of *Eliz.* c. 2. the justices of the borough may do this very act, if it be necessary; for it is thereby enacted "that the mayors &c, of every town and place corporate, being justices of peace, shall



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have the same authority by virtue of this act within the limits of their jurisdictions, as the justices of the peace of the county have &c." 4thly. On the merits of the case; recourse should first have been had to the other parishes in the borough, where there are many persons of opulence, and where the rates are not so high as in those adjoining to the borough. It was also pressed that the rule should be discharged with costs, because there was no imputation on the defendants; and as they have discharged their duty to the Public, they ought to be indemnified against all expence.

*Bearcroft*, in support of the rule, answered the first objection, by saying that this was not a matter of discretion in the defendants; for on a similar application a *mandamus* was granted directed to the justices; the Court saying "As this is a matter of right, they ought to make a return." 16 *Vin. Abr.* 416; 2 *Shaw's Pract. Just.* 44. In answer to the second objection, the justices may either tax a whole parish in aid, or only particular persons. In *Dimchurch* and *Eastchurch* (a), Lord *Holt* said "There are two ways by the 43 *Eliz.* to make one parish contributory to the poor of another parish, *viz.* either the justices may tax particular persons in aid to that parish, which cannot relieve its own poor; or they may assess the whole parish in a certain sum, and leave it to the churchwardens and overseers to levy the same on particular persons." So, in the case of the parish of *St Peter and Paul* in *Marlborough* (b), it was said that "the justices are to make the rate on all, or particular persons." And in *R. v. Inhabitants of Knightley* (c), it was ruled that "the justices may either charge particular persons or the whole parish." But even if the form of the motion were irregular, in such a case as the present the Court would order it to be amended. No objection can be made on account of this being a vill; for a vill is entitled to relief under the stat. of *Eliz.* though parishes only are mentioned. *Fol.* 25. 3dly. This does not come within the 8th section of the 43 *Eliz.* which relates to borough justices. If indeed the defendants were called upon to make a rate on any parish within the borough, perhaps there might be some weight in the objection: but here the justices for the borough have no jurisdiction over the parishes out of the borough, which (if the present application be well founded) ought to contribute in this instance. And perhaps it would not be too much to contend that that section of the statute is not applicable to such a

(a) *Salk.* 481.(b) 2 *Sira.* 1114.(c) *Comb.* 309.



case as this, but refers only to the other powers given by the act; for there are many exclusive jurisdictions having only one parish, in which case the county justices must from necessity interfere, if relief be wanted from another parish. As to the last objection; the court will not try these disputed facts on a summary motion, but will grant a *mandamus*, on the return to which these facts may be tried. And there is no pretence to ask for costs in this case, where (if granted) they must be borne by a parish already too poor to support themselves.

Lord KENYON, Ch. J. I perfectly agree with the counsel, in support of this application, that this part of the parish of *Dodderbill*, within the borough, which is a vill, and supporting its own poor, is for this purpose equivalent to a parish. But on the great question, of jurisdiction, I differ from him. These justices having admitted that this part of the parish is in need of the assistance required relieves us from discussing one of the points made, whether the *mandamus* should be merely to hear the complaint, or to do the act required. But the point, on which this must be decided, is that these defendants have no jurisdiction. It is admitted on all hands that the borough of *Droitwich* is an exclusive jurisdiction, with a *non intromittant* clause as to the justices of the county; the justices of the county therefore have no authority to enter the borough. This section of the act says that if the justices perceive that any of the inhabitants of any parish are not able to levy among themselves sufficient sums &c, the said two justices shall and may tax, rate, and assess, any other of other parishes &c. Having the allowance of all assessments, and the superintendence of the overseers' accounts, the Legislature presumed that the justices would have the means of knowing the necessities of all the parishes within their jurisdiction: but they cannot have any opportunity of knowing the circumstances of those districts, which lie out of their jurisdiction. And therefore, to provide for all cases that might happen, the eighth section of the act was introduced, which gives the same power to borough justices that was before given to the county justices. So that in all cases the acts of magistrates are to be confined within the limits of their respective precincts. There is one difficulty indeed in a case where the borough consists only of one parish. But the argument, drawn from thence, to shew that the county magistrates must of necessity interfere, proves too much; for there are instances of such towns being counties of themselves, e. g. the borough of

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of *Caermarthen*: but in such a case it is impossible to say that the justices of the adjoining county can interfere. On the single ground therefore, that this application was made to those who have no jurisdiction over the subject, and no means of informing themselves whether the parish want assistance or not, I am of opinion that the rule must be discharged; the application should have been made to those justices who have jurisdiction over the parish seeking relief, and also over that parish out of which the relief is to come.

BULLER, J. There is no weight in the objection which has been made to the form of this rule; because if a *mandamus* may be granted either way, it is immaterial in what terms this rule is drawn up. But cases have been cited to shew that the *mandamus* may be to compel the justices to rate some parish generally; and if such has been the practice, it ought to be supported. The case cited from *Fol.* shews, what cannot be disputed, that one vill might be taxed in aid of another. In the case of *St. Agnes, Cornwall*, this point, about rating one parish in aid of another, was not discussed: the only question there made was on the merits; and as it was made out by the affidavits that the parish seeking relief were actually in want of it, the *mandamus* was granted. But the principal question here is whether the justices of the county have in this instance any jurisdiction over that part of the parish of *Dodderbill* which lies within the borough; and I am clearly of opinion that they have not. It is manifest from this act of parliament that no justices can execute the third section of it but those who have jurisdiction over the parish which is in need of assistance from some other parish; and therefore the county justices cannot give the relief prayed for in this instance, out of their jurisdiction. By the 9th section of the act also it is enacted that where any parish lies partly within any town corporate, and partly without, the county justices, and also the head officers of such town corporate, "shall deal and intermeddle only in so much of the said parish as lieth within their liberties, and not any further." Then by this clause the two parts of the parish of *Dodderbill* are to be considered as two distinct parishes; and consequently over that part which is the subject of our consideration, the justices for the county have no jurisdiction. The *mandamus* now prayed for is to compel the county justices to do the act: but the form of it, if it were granted at all, should be to compel them to enquire, in the first place, whether the parish stand in need of any assistance;

I

and



and to act accordingly; whereas in this instance we should be requiring them to enquire into that, which they have no means of knowing. I am therefore of opinion that this application should have been made to the borough justices.

GROSE, J. This is a new attempt to compel the justices of the county to relieve a parish out of their jurisdiction. But they cannot give the relief prayed for, without having an opportunity of knowing that the parish without their jurisdiction really stand in need of it. The 9th section of the act is decisive against this application. This attempt is not only new, but altogether unfounded.

Rule discharged.

NESBITT and Another *against* LUSHINGTON.

THIS was an action on a policy of insurance on wheat and coals on board the *Industry*, Captain *Cassidy*, from *Youghall* to *Sligo*, for 100*l*. The first count in the declaration, after setting forth the policy &c, &c, stated that when the ship was proceeding on her voyage she was by tempestuous weather, and the force and violence of the winds and waves, necessarily obliged, for the preservation of the ship and cargo, to sail and proceed to *Elly Harbour* in *Ireland*, where she was, with force and in a violent and unlawful manner, attacked and boarded, *and arrested, distrained, and detained by people* to the plaintiffs unknown; by reason whereof the wheat and coals became and were wholly lost to the plaintiffs; with an averment that the plaintiffs sued, laboured &c, about the defence and safeguard and recovery of the said goods, and necessarily expended &c. In the second count the loss was stated thus; that the ship having her cargo on board was in *Elly Harbour* "with force and in a violent and piratical manner *attacked and boarded, seized and taken, by certain pirates* to the plaintiffs unknown; by reason whereof the said goods then and there became and were wholly lost to the plaintiffs &c." There were also the general counts for money paid, lent, had and received, and on an account stated. The policy was in the usual form, and the perils insured against were "The seas, men of war, fire, enemies, *pirates*, rovers, thieves, jettizons, letters of mart and countermart, surprisals, takings at sea, *arrests, restraints, and detainerments of all kings, princes, and people, of*

board the insured may recover on a count stating the loss to be

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If an armed force board a ship, and take part of the cargo, the underwriters are not liable on a count, stating the loss to be by a seizure by people to the plaintiffs unknown; for "people" in the policy means the governing power of the country. Where, after such a seizure, the vessel was stranded, and part of the cargo (consisting of corn) taken by the mob at their own price, the loss cannot be recovered, as for a general average: but for such part as in consequence of the stranding was damaged and thrown over-  
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*what nation, condition, or quality soever*; barratry of the master and mariners; and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage, of the said goods and merchandizes, or any part thereof." It also contained the common printed "memorandum; corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general, or the ship be stranded:—sugar, tobacco, hemp, flax, hides and skins, are warranted free from average under 5 *l. per cent.*, and all other goods free from average under 3 *l. per cent.* unless general, or the ship be stranded."

It appeared in evidence that the ship was forced by stress of weather into *Elly Harbour* in *Ireland*. And there happening to be a great scarcity of corn there at that time, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove on a reef of rocks, where she was stranded; and they would not leave her till they had compelled the captain to sell all the corn (except about 10 tons) at a certain rate, which was about three fourths of the invoice price. The 10 tons were lost in consequence of the stranding, by which it was damaged, and was obliged to be thrown overboard. The ship afterwards arrived at her place of destination with the remainder of her cargo, which was about 25 *l.* worth of coals. The jury found a verdict as for a total loss; but it was understood that the real loss would be adjusted if the Court should be of opinion that the plaintiffs were entitled to recover under the circumstances. A rule *nisi* having been granted for setting aside the verdict,

*Erskine, Law, and S. Heywood*, now shewed cause; and proposed to consider 1st. Whether there had been *any* loss within the policy. 2. Whether it was a *total* loss. 3. Whether a general or particular average. 4. Whether the subject insured, being corn, fell within the memorandum in the policy. 1st. The loss in question falls under one or other of two risks insured against by the policy; either that of arrests &c, of all kings, princes, and *people*, in which the word *people* must be understood as contradistinguished from the magistracy of a country, which is denoted by the words *kings* and *princes*. And that construction is much strengthened by what follows the word *people*, namely, "of what nation condition or quality soever;" that cannot apply to whole nations so aptly as to particular individuals. During the *American* war in cases of capture by their vessels they



they were described as *made by persons unknown*, and no objection was ever taken; which shews this to be the sense in which they were understood at that time. Or this is a capture by pirates, and loss by piracy is expressly insured against. Whatever would be robbery at land is piracy at sea. Obliging the owners of corn by force to sell it on shore for a particular price imposed by the buyers themselves would certainly be robbery. A man was lately executed at York (a) for this offence; he having in conjunction with others tumultuously assembled and compelled the proprietors to part with that article at a certain price. Assaulting a ship upon the high seas and obliging the captain to redeem her for so much or for a certain part of the cargo is considered clearly to be piracy in *Lex. Merc.* 149. 242. And this is the same thing, where the pirates obliged the captain to ransom the vessel by the sale of the corn at their own price. 2. This must be considered (apart from the money received for the corn) as a *total*, and not merely as an *average*, loss, as to the cargo. It is immaterial that the *ship* arrived at her destined port, for this is a policy on the cargo, and the criterion is whether the thing insured arrived at the destined port; if it did, in however deteriorated a state it might be, it is only an average loss: but here the corn, which formed the great bulk of the cargo, the coals being of very trifling value, never did arrive at the destined port; and therefore as to the corn there was a total loss. In *Baillie v. Moudigliani*, *H. 25 Geo. 3.* it was clearly considered that where the object of the voyage was lost, it was a total loss as to the cargo, though the ship were saved. And this distinction is taken by *Park. on Ins. c. 6.* where different parts of a cargo are capable of a distinct and several valuation; there a loss happening to any one separate part shall be considered as a total loss with respect to such part. It is true that in the 2d edition that distinction is not so strongly worded; but the same distinction is laid down by Lord Mansfield in *2 Burr. 1170.* It was for the advantage of the underwriter that the ship should proceed afterwards with the coals, and therefore the owners ought not to be in a worse situation than if they had abandoned the whole concern. As far as their own interest was concerned, it was a losing voyage to them to proceed after the corn was taken out. When by any peril within the policy the market is lost, it has always been considered as a total loss. The circumstance of having received so much money in part of the

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(a) *R. v. Spencer*, York Summer Assizes, 1783, cor. Buller, J.



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value of the corn will be so much salvage to the underwriter.

3. But if this is not to be considered as a total loss, because the owners did not abandon, yet it is a *general* and not a *particular* average. It is laid down in *Lex Merc.* 147. and all other books on insurance, that whatever damage or loss is incurred by any particular part of the ship or cargo for the preservation of the rest, such damage or loss shall be considered as *general* average; that is, the whole concern of the ship and cargo shall contribute their respective proportions to indemnify the owner of the particular adventure, for the damage incurred for the good of all. And in the same book *p.* 149. this very case is put as an example; that where a pirate takes part of the goods to spare the rest, contribution must be paid. Now here it is evident that the captain was obliged to let the people have the corn at their own price for the ransom of the ship and the rest of the cargo. No doubt can be entertained but that if he had resisted their demands in this respect, they would have destroyed the whole concern. 4. If this be not a *general* average, the words of the memorandum will be objected, by which *corn* is warranted free from average, unless general, or the ship be stranded. But the true meaning of the memorandum must be confined to that sort of damage which is naturally incident to the commodities there referred to, which, being of a perishable nature, are liable to a peculiar species of deterioration not common to other articles. It never could be intended to apply to such a loss as this happening by irresistible force, which might have occurred to any other merchandize whatever. The reason of the distinction does not apply, which was to prevent disputes in these articles, subject to heat and putrefaction, whether the damage happened by any of the casualties of the voyage insured against, or from the innate qualities of the commodities themselves. The true construction of the memorandum is, that if there be a total loss of the commodity there mentioned, it may be recovered as a partial loss on the whole cargo. But even if the Court should be of a different opinion, still the plaintiffs are entitled to recover upon this policy for the 10 tons, which were actually lost by the stranding, and which is directly within the words of the memorandum; and therefore they ought not to be turned round by the form of the declaration. They are also entitled, upon the general count, for all the money paid in order to preserve the rest of the cargo, and to enable the ship to proceed on the voyage.

*Bearcroft and Baldwin, contra*, were stopped by the Court.



LORD KENYON, Ch. J. There is some novelty in this case: and I wish that the plaintiffs could have recovered in this form of action, because they certainly may in another, as to part of the loss. That which happened in this case does not fall within the meaning of "arrests, restraints, and detainments of kings, princes, and people." The meaning of the word "people" may be discovered here by the accompanying words; *nositur à sociis*; it means "the ruling power of the country." But I think that this loss falls within a capture by pirates: and if a particular average could have been recovered upon this policy, the plaintiffs might have recovered upon the count, stating the loss to have happened by piracy. But, this being a policy upon corn, the memorandum states that the underwriter will not be liable for any average, unless general, or the ship be stranded. And I am of opinion that this is not a general average; because the whole adventure was never in jeopardy. There is no pretence to say that the persons, who took the corn, intended any injury to the ship or to any other part of the cargo but the corn, which they wanted in order to prevent their suffering in a time of scarcity. Therefore the plaintiffs could never have called on the rest of the owners to contribute their proportion, as upon a general average. On the meaning of the memorandum I have no doubt. The articles there enumerated are of a perishable nature: as it might be difficult to ascertain whether their being damaged arose from any accident, or from the nature of the articles themselves, this memorandum is inserted in all policies, to prevent disputes; and by it the underwriters expressly provide that they will not pay any average on these articles, unless it be general, or the ship be stranded. When a ship is stranded, then the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though that fact cannot always be ascertained. Therefore here all the damage done to the cargo thrown overboard may be ascribed to the stranding; but the objection is that the declaration imputes the loss to another cause. I do not say whether or not there was any moment when the insured might have abandoned: but in fact they did not abandon; and there was no total loss; for the cargo produced three-fourths of its real value, and the ship performed her voyage. On the whole it appears to me that the plaintiffs are entitled to recover for part of this damage, though they cannot recover in this form of action.



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BULLER, J. With respect to the objection, that this does not fall within the reason of the memorandum; there are only two instances, in which the owner may recover an average loss on the articles there enumerated; either where the average is general, or where the loss arises from the stranding of the vessel. Now this cannot be said to be a general average, for the reasons already given. And as to the other instance of stranding, the plaintiffs are entitled to recover for any loss occasioned to the cargo in consequence of the stranding, provided it be a direct and immediate consequence of the stranding: but they cannot recover for that which was taken by the mob; for that was not the consequence of the stranding, but, on the contrary, the stranding was occasioned by the mob coming on board for the corn. The rioters took possession of the ship in order to get at the cargo: but this loss cannot be ascribed to the stranding. Suppose the mob had taken out 100 quarters of corn before the ship had been stranded, and had used no threat to destroy the whole, if that were not delivered to them, it is clear that the underwriters would not be liable. Then the fact of their taking the corn after she was stranded is as much unconnected with that circumstance as if it had been taken before. But the loss which happened to that part of the cargo, which was thrown overboard, being ascribable to the stranding, and being a direct and immediate consequence of the peril insured against, might have been recovered, had there been any count in the declaration applicable to a loss by stranding. There is no pretence to say that this was a total loss, for the reasons given by my Lord. And with regard to the passage from *Park on Insurance*, it has been very properly corrected in the second edition. Neither can I agree with the construction put at the bar upon the word "people;" it means "the supreme power;" "the power of the country," whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of "pirates, rogues, thieves:" then having stated all the individual persons, against whose acts they engage, they mention other risks, those occasioned by the acts of "kings, princes, and people, of what nation, condition, or quality soever." Those words therefore must apply to "nations" in their collective capacity.

GROSE, J. declared himself of the same opinion.

Rule absolute.



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ELLIOTT *against* The Duke of NORFOLK.Friday,  
June 22d.

**T**HIS was an action upon the case against the defendant, as chief bailiff of the liberty of *Hallamshire*, for permitting *J. Grayson*, a prisoner in execution at the suit of the plaintiff, to escape. The defendant pleaded that a little before the escape in the declaration mentioned, after the last day of *July* in the year 1715, to wit, on the 27th day of *July* 1791, at *Sheffield*, in the county of *York*, divers persons unlawfully, riotously, and tumultuously, assembled together, to the disturbance of the public peace, and being so assembled, then and there unlawfully and feloniously, with force (the said force then and there being so great and violent that the defendant could not resist the same) without the license and against the will of the defendant (and although the defendant then and there did as much as in his power lay to prevent the same) in part demolished a certain dwelling house of the defendant (the same then and there being the prison of the defendant, as such chief bailiff as aforesaid, situate and being at *Sheffield*, &c) in which said dwelling house and prison the defendant then and there had the said *J. Grayson* in his custody, for the cause in the declaration in that behalf mentioned, and thereupon then and there unlawfully, feloniously and with force (the said force then and there also being so great and violent that the defendant could not resist the same,) without the license and against the will of the defendant (and although the defendant then and there did as much as in his power lay to prevent the same) rescued the said *Joseph* out of the said custody of the defendant; by reason whereof the said *Joseph* then and there, without the license and against the will of the defendant (and although the defendant then and there did as much as in his power lay to prevent the same) escaped out of the custody of the defendant, and fled to places to the defendant unknown, &c.

To this plea there was a general demurrer.

*Wood*, in support of the demurrer, after stating the general principle, that sheriffs and gaolers are answerable in all cases for the escape of prisoners, except it be occasioned by the act of God, or the king's enemies, was stopped by the Court.

*Lambe, contra.* The principle, on which sheriffs are responsible, is not applicable to this case. In *Southcote's case* (a) it is

(a) 4 Rep. 84. b.

said

If a mob riotously and by force demolish a gaol, by which the debtors escape, the sheriff or gaoler is answerable to the creditors for their escape.



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said "If traitors break a prison, it shall not discharge the gaoler; otherwise of the king's enemies of another kingdom; for in the one case he may have his remedy and recompence, and in the other not." But here the defendant has no remedy over; the civil remedy being merged in the felony by the riot act; Stat. 1 Geo. 1. st. 2. c. 5. s. 4. Nor can the statutes (a), which were passed after the riots in London in 1780, be deemed conclusive against this defendant, as to his liability in such a case as the present; because they had other objects in view besides the indemnity of the marshal, &c. But

The Court said that the current of authorities was against the defendant; and that the statutes which were made immediately after the riots in 1780 to indemnify the marshal evinced the opinion of the Legislature upon the subject. They also hinted that the riot act had substituted another remedy against the hundred (b) in lieu of that which it took away against the rioters themselves.

Judgment for the plaintiff.

(a) 20 Geo. 3. c. 64. 21 Geo. 3. c. 1.

(b) It was suggested at the bar that the remedy given by the riot act was ineffectual in this case, because the limited time for

suing under it was passed; and that, not owing to the laches of the defendant, who could not sue till a judgment recovered against him.

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### CRESPIGNY against WITTENOOM and Another.

If an annuity be granted in consideration of the grantee's giving up his business to the grantor, it need not be registered under the 17 Geo. 3. c. 26.

THIS was an action of covenant on articles of agreement between the plaintiff of the first part, the defendant *Wittenoom* of the second, and the defendant, *Crespigny* the younger, of the third part; dated in June 1788. By those articles, (which recited certain articles of copartnership, dated in August 1786, between the plaintiff and the defendant *Wittenoom*, by which it was agreed that the business of the copartnership (as proctors) should be carried on in the name of *Wittenoom* only until the defendant *Crespigny*, the younger, should be admitted a proctor, after which the same should be carried on in the names of the two defendants, it being intended, and thereby agreed, that *Crespigny*, the younger, should become a partner in equal degree with *Wittenoom*; and which also recited that *Crespigny*, the younger, had been lately admitted a proctor, and that the plaintiff was desirous to quit and give up the business upon the defendants' paying the plaintiff the clear annual sum of 400 l.) it was covenanted and agreed that, in consideration of the plaintiff's



plaintiff's giving up the business to the defendants, they would pay him the clear annual sum of 400*l.* during his life, by quarterly payments, and also the further sum of 37*l.* 10*s.* every three months during the joint-lives of the plaintiff and *Mary Green*, widow of *J. Green* who was late a partner with the plaintiff. The declaration, after stating the above, assigned a breach in non-payment.

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The defendants pleaded that the articles of agreement were made and executed after the passing of the statute, 17 *Geo.* 3. c. 26; that no memorial of those articles was within twenty days of the execution thereof inrolled in the court of Chancery, as that act requires; and that therefore the articles were null and void. To this plea there was a general demurrer, and joinder.

*Chambre* for the demurrer. This case comes within the exception in the last clause of the annuity act, which provides against the extension of the act to any "voluntary annuity granted without regard to pecuniary consideration." This indeed was not a *voluntary* annuity according to the most extensive signification of the term; but the words which follow, namely, "without regard to pecuniary consideration" shew the sense in which the word *voluntary* was intended to be used. And here no pecuniary consideration was given, the consideration being the relinquishment by the plaintiff of a lucrative business in favour of the defendants. That this is the true construction of the act is apparent from the general scope and intention of it, which was to guard against the improvident acts of infants or necessitous persons, who were driven to make hard bargains for the sake of a present supply of money.

*The Court* said they were inclined to hear the objections, from the other side, to this memorial.

*Shepherd, contra*, said that the object of the annuity act was not so confined as had been represented. It is a general regulation "for registering the grants of life annuities"; and the preamble cannot control the enacting part of the act. Now the first section in terms extends to the grant of *any* annuity; and therefore this case must be included therein, unless it fall within any of the subsequent exceptions. Neither can it be urged that the object of the act was only to secure the registering of annuities for *pecuniary considerations*, or, in the terms of the third clause, where the consideration was "in money only;" for there are many exceptions introduced into the act which would



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be altogether nugatory if that were the intention of the Legislature; amongst others, that in the fourth clause for avoiding any annuity, where any part of the consideration shall be in goods; or "annuities given by will or marriage settlement, or for the advancement of a child," mentioned in the last clause, where there is no pecuniary consideration paid. Then if the construction of the act be not confined to annuities where money only is paid, it must extend to all cases, not particularly excepted; and this is not one of the exceptions; for the word *voluntary* must be taken as contradistinguished from *consideration*. If that be not so, and the construction on the other side be adopted, the word will be perfectly *nugatory*: for then whether it be *voluntary*, or for a valuable consideration, it will make no difference, provided that consideration be not pecuniary. This would be to reject a sensible operative word from the act, which cannot be permitted, and would be letting in great part of those very mischiefs against which the act was principally intended to guard; For fraudulent annuities may still be granted upon some supposed services or considerations other than money.

Lord KENYON, Ch. J. It is apparent from the preamble, and the different clauses of the act, that the Legislature did not intend that there should be any memorial of an annuity like the present. The preamble states the mischiefs of granting annuities for small considerations by improvident persons; and those mischiefs are guarded against by the several clauses in the act, as far as human prudence can go. It is evident that the act was intended as a check against hard bargains. The third clause expressly says that the consideration shall be paid in *money only*. The next section indeed says that if any part of the consideration be paid in *notes*, and those notes be not afterwards paid, the Court may order the deeds securing the annuity to be cancelled. The Court therefore were bound by the positive words of the act to declare that annuities, the consideration of which was paid in notes, must be registered pursuant to the act. But in both these cases the annuity is granted in consideration of *something paid* to the grantor; and no decision has extended the provisions of the first clause beyond these two cases. Here either the annuity was absolutely void, because not granted for either of the considerations mentioned in the third and fourth sections, and then no registry of it could make it good; or it was such an annuity as could not be registered according to the act. But it is too much to say that the annuity is void in itself; and I think



think that neither the spirit or the words of the act require that it should be registered. As to the argument, *exceptio probat regulam*; it seems to me that the anxiety of some members of the House induced them to insert the last clause, after the act was first drawn; but I think that the first section could never have been extended to the cases mentioned in the last, if they had not been excepted.

BULLER, J. I agree that the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms. But if any doubt arise on the words of the enacting part, the preamble may be resorted to to explain it. Now the general intention of the Legislature may be collected from the preamble, which recites "the pernicious practice of raising money by the sale of life annuities;" and the body of the act is also confined to annuities granted in consideration of money, or notes. By another clause too it is evident that the act does not extend to this case. The seventh section prohibits brokers taking more than 10s. for every 100l. actually paid. It is impossible to suppose that the Legislature intended to prohibit a broker receiving any premium for his trouble in negotiating such an annuity as the present; and yet his premium cannot be estimated according to the directions of that clause. With regard to the words in the excepting clause "without regard to pecuniary consideration;" I think they were added to shew the sense in which the word "voluntary" was before added; and that the meaning of that part of the clause is this, that any annuity granted for any other than a pecuniary consideration shall for the purposes of the act be considered to be a *voluntary annuity*.

GROSE J. Though the preamble cannot control the enacting clause, we may compare it with the rest of the act in order to collect the intention of the Legislature; and I think it is apparent, from the whole of this act, that it was not their intention to extend it to a case like the present. In cases where money has been paid as the consideration, the Courts order the money to be restored when they vacate the annuity deeds: but the business, the relinquishment of which was the consideration of granting this annuity, we cannot order to be restored.

Judgment for the plaintiff.

1792.

CRESPIGNY  
against  
WITTENOOM



1792.

Friday,  
June 22d.The GOVERNOR and Company of the British Cast  
Plate Manufacturers *against* MEREDITH and Others.

Where the  
acts of com-  
missioners ap-  
pointed by a  
paving act  
occasion a  
damage to an  
individual  
without any  
excess of ju-  
risdiction on  
their part,  
the commis-  
sioners or pa-  
viers acting  
under them,  
are not liable  
to an action.

THIS was an action upon the case, in which the plain-  
tiffs declared That before and at the time of committing  
the grievances mentioned they were and from thenceforth  
hitherto have been and still are possessed of a certain messuage  
&c, and a certain yard or piece of land, with divers (to wit)  
three warehouses erected and built thereon, situate on the *North*  
*side of High-ground Street*, in the parish of *Christ Church* in *Sur-*  
*rey*; and also of a certain entrance or gateway leading from the  
street through and under the messuage into the yard or piece of  
land; and which said entrance during all the time aforesaid,  
until &c, was used and of right &c, by the plaintiffs, for the  
passing and repassing of carts, waggons, and other carriages, in  
the service of the plaintiffs into and out of the yard or piece of  
land for the more convenient and beneficial enjoyment and oc-  
cupation of the yard, and of the warehouses &c, yet that the  
defendants on &c, wrongfully and injuriously raised &c, the  
said street, and the soil and pavement thereof, before the said  
entrance &c, by placing great quantities of wood &c upon the  
street &c there, to a much greater height than the street or the  
soil and pavement thereof were before raised, (to wit) to the  
height of four feet more &c, and so close and near &c, to the  
entrance, that it was and still is thereby greatly blocked up and  
obstructed, insomuch that the carts &c employed in the service  
of the plaintiffs have been and still are thereby prevented from  
passing and repassing through the entrance, and the plaintiffs  
are thereby much injured &c.

The defendants pleaded the general issue; and at the trial at  
*Kingston* before *Gould J.* a verdict was found for the plaintiffs  
with 150 *l.* damages, subject to the opinion of this court on the  
following case.

The plaintiffs were possessed of the premises mentioned in the  
declaration under a lease for 95 years from *Christmas 1777*.  
The warehouses standing in the yard have been used by them  
since they have been in possession for the depositing and keep-  
ing of plate glass, which is a commodity of large value; and  
very brittle in its nature. The gateway in question before the  
committing of the grievance was of the height of 12 feet and



1 inch, from the old pavement, with which the street in question had been formerly paved; and the gateway was used for the purpose of admitting waggons into the yard, loaded with plate glass, that they might be unloaded at the door of the warehouses. The defendants, who acted as paviors under the authority of the commissioners, named in an act passed in the last session, for paving &c *Upper-Ground Street*, in the parish of *Christchurch* in *Surry*, and certain other streets &c, raised (a) the pavement 2 feet and 1 inch higher than the old pavement. The gateway in the centre of the arch is only 10 feet high from the level of the new pavement, so that the height of the gateway is now reduced 2 feet and 1 inch. The defendants soon after the passing of the above act of parliament, and before the commencement of the present action, in order to execute the powers and provisions of the said act proceeded to take the level of the street, in order to its being paved; and for that purpose they caused a straight and halt line to be drawn in the front of the houses in the street, shewing the level and height of the new intended pavement. And about three months afterwards the defendants laid the ground according to such level and agreeably to the line so marked out, and paved the same, which now makes a regular inclined plane with a declination of only one foot of perpendicular height in seventeen feet of length; and it would not be effectual if done in any other way: Whereas in the original state the declination was about one foot in twelve, which was a very unsafe declivity for horses and carriages going up or down. The line so made was necessary and proper; and any alteration of the inclined surface of the street less material was not sufficient to render the street safe for carriages passing through. In order to admit carriages as heretofore it will be necessary to take down the arch and heighten the same. The case then stated that by these means the plaintiffs are deprived of the use of the gateway as they had it before, and waggons and other carriages are prevented passing to their warehouses, and are obliged to be unloaded in the street. It was also proved that the plaintiffs had given notice to the defendants, and also to the commissioners, that, unless the buildings were so altered as to enable the plaintiffs to enjoy their warehouses as they did before the act passed, an action would be brought against them for a satisfaction in damages.

(a) By sect. 13. the commissioners were | paved, repaired, raised, sunk, or altered,  
empowered to cause the said street &c to be | &c.

1792.

GOVERNOR  
&c. of Cast  
Plate Manu-  
facturers  
against  
MEREDITH.



1792.

GOVERNOR  
&c. of Call  
Plate Manu-  
facturers  
against  
MEREDITH.

*Garrow*, for the plaintiffs, relied upon the case of *Leader v. Moxton and Others* (a), which was directly in point with the present; and established the principle that the commissioners under such an act as the present are liable to make good to individuals any actual damage sustained by their acts. And this is founded in good sense, for it could never be supposed to be the intention of the Legislature that the avenue to one man's house should be blocked up for the convenience of his neighbours without some compensation.

*Fielding, contra*, was stopped by the Court.

LORD KENYON, Ch. J. If this action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. If the Legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer. But if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction. But it does not seem to me that the commissioners acting under this act have been guilty of any excess of jurisdiction. Some individuals suffer an inconvenience under all these acts of parliament; but the interests of individuals must give way to the accommodation of the public. I doubt the accuracy of the report of the case cited from *Wilf.*; for I cannot conceive that the judges, in considering whether or not the action could be supported, laid any stress on the enormity of the damage sustained by the plaintiff. That circumstance might have induced the jury to encrease the damages, if the action could be supported, but could not of itself give a cause of action: that must have depended on the question whether or not the commissioners exceeded their jurisdiction.

BULLER, J. The question here is whether or not this action can be maintained; and I am clearly of opinion that it cannot, because a particular remedy is pointed out by the act (b). If there had been no clause in the act empowering the commissioners to give satisfaction to the party grieved, I am by no means satisfied that, on the broad principle stated by the plaintiffs' counsel, any action could be maintained. There are many cases

(a) 3 *Wilf.* 461. *vid.* 2 *Bl. Rep.* 924. S. C.

(b) The 46th section authorised the commissioners "to make any allowance, or pay part of the expences incurred by the proprietors of any such house or building, in removing any of the obstructions, nuisances,

or annoyances, as aforesaid, in such cases where the proprietors should or might be materially injured on account of the pavement being necessarily raised or lowered, and whereby such cases might be particularly entitled to some compensation."

in



in which individuals sustain an injury, for which the law gives no action; for instance, pulling down houses, or raising bulwarks, for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed say that the individuals, who suffer, have a right to resort to the public for a satisfaction: but no one ever thought that the common law gave an action against the individual who pulled down the house &c. This is one of those cases, to which the maxim applies, *salus populi suprema est lex*. If the thing complained of were lawful at the time, no action can be sustained against the party doing the act. In this case express power was given to the commissioners to raise the pavement; and, not having exceeded their power, they are not liable to an action for having done it.

GROSE, J. The clause in the act, which empowers the commissioners to award satisfaction, is decisive against this action.

Postea to the defendants.

### The KING *against* The Inhabitants of DARLINGTON.

Saturday,  
June 23<sup>d</sup>.

TWO justices removed *Sarah*, the widow of, *T. Milburn*, and her seven children, from *All Saints* to *Darlington*: the Sessions on appeal confirmed the order and stated the following case.

*John Milburn* the grandfather of the pauper's husband, being a settled inhabitant of *Darlington* in the county Palatine of *Durham*, came into the parish of *All Saints* in *Cambridge*, under a certificate from *Darlington* dated 13th July 1736. During his residence there (amongst other children) he had a son named *Thomas*, who lived in *All Saints*, as part of his father's family, except for one year, during which he lived as a hired servant with one *Collett* in *All Saints*; after which service he returned to his father; and afterwards married, and had several children, and (amongst others) *Thomas*, the husband of the pauper, *Sarah Milburn*; which *Thomas* lived in *All Saints* till the time of his death. The last mentioned *Thomas*, when of the age of fourteen years, was hired to and lived as a servant with *Mr. Brooks* for the space of three years in *All Saints*. *J. Milburn* the grandfather, some time before the grandson's service with *Brooks*, returned with his wife to *Darlington*; leaving behind his son *Thomas*, with his family, and amongst them his grandson *Thomas*. *J. Milburn* the grandfather and his wife died in *Darlington*.

Neither

1792.

GOVERNOR  
&c. of Cast  
Plate Manu-  
facturers  
*against*  
MEREDITH.

A parish certificate only includes the certificated man, his wife, and those children who live with him; but does not extend to grandchildren.



1792.

The KING  
against  
The Inhabi-  
tants of  
DARLING-  
TON.

Neither *Sarah* the pauper or either of her children has since the death of *Thomas* the husband done any act to gain a settlement.

*Erskine, Wilson, and Raymond*, in support of the order of Sessions. Two questions arise in this case; 1st, Whether a certificate extend to grand-children; 2dly, Whether, if it do, the certificate, which was granted to the grandfather of the pauper's husband be still in force, or were *functus officio* on the grandfather's return to *Darlington*. Being desired by the Court to confine themselves to the first question, they contended that the certificate extended to grand-children. There is no doubt but that it includes children; for on the birth of a child the certificate, granted to the father, attaches on him; and this is again communicated to his child afterwards. The consequence of not extending it to grand-children will be this, that as the son is protected by the certificate, he has a right to reside in the certificated parish, but his children must, after the age of seven, be separated from him even before they become actually chargeable, or he himself must remove back again to the parish granting the certificate; and by those means the inconveniences, against which the certificate act meant to guard, will be produced. But this point does not rest on reasoning only; for in *R. v. Taunton St. Mary Magdalen* (a), it was said by the only three judges then in court, after the argument, that a certificate extends to grand-children: *Denison, J.* said "I should at present imagine that descendants are included as well as immediate children:" *Wilmot, J.* also thought "that the word 'family' took in all descendants whatever; for that a devise to *children* takes in grand-children;" and *Foster, J.* added, "In the civil law '*liberi*' extends to grand-children." It is true that case was afterwards decided upon another point, which made it unnecessary to determine expressly upon this; but it is to be observed that *Denison, J.*, in delivering the subsequent opinion of the Court, did not retract what was said upon the former occasion relative to the operation of the certificate. Again, this Court, in giving their opinion in the case of *R. v. St. Mary Westport* (b), proceeded upon a supposition that the certificate act extends to grand-children. There the grandson and two great-grand-children of a certificated person were removed from *Bradford* to *St. Mary Westport*, the certifying parish; and one of the grounds was the pregnancy of one of the great-grand-children, which would probably be illegitimate, the wo-

(a) *Burr. S. C.* 402.(b) *Ante* 3 vol. 44.



man being unmarried; the Court did not think this a sufficient reason, because (they said) "certificated persons could not be removed till they were actually chargeable, whereas that only made it probable that she would become chargeable:" but the very foundation of that decision was that the certificate extended to the grandson and great-grand-children of the person originally certificated; otherwise the Court would not have reversed the order of removal, by which those persons were sent back to the certificating parish; for there was no pretence to say that they had acquired any settlement in *Bradford*, and the order was reversed only because their residence at *Bradford* was protected by the certificate. The decision of that case therefore must necessarily be wrong, if it should be now held that a certificate is confined to immediate children. In *Wythe v. Thurlston* (a), and *Gale v. Bennett* (b), a bequest to *children* was extended to *grand-children*. Perhaps the reason, why there are not more decisions upon this part of the certificate act, is that after the opinion thrown out by the three judges in the *Taunton* case, it was so universally considered as a settled point, not only in *Westminster-Hall*, but throughout the kingdom, that it has never since been doubted. It has been acted upon since that time; and therefore it will be dangerous now to lay down a different rule; one of the consequences of which will be the immediate removal of many hundred persons, who are residing in different parishes under an idea that their residence is protected there by certificates originally granted to their respective ancestors.

LORD KENYON, Ch. J. If this question were at rest, either by reason of decided cases, or by the general opinion of *Westminster-Hall*, I should not be inclined to disturb it now. But I perfectly well remember that, when the *Taunton* case was argued, so far from the profession acquiescing in what was thrown out by the three judges immediately after the argument, great doubts were entertained about it. And I infer the very reverse of what has been now attributed to those judges, that they afterwards continued of the opinion which they first threw out; for, having hinted a loose opinion respecting the operation of the certificate, when they came to consider the case more maturely, they desired not to be bound by what they had said upon that point upon the former occasion, expressly saying that it was unnecessary for them to enter into the question.

1792.

The KING  
against  
The Inhabi-  
tants of  
DARLING-  
TON.

(a) *Ambl.* 555.(b) *Ib.* 681.



1792.

The KING  
against  
The Inhabi-  
tants of  
DARLING-  
TON.

In this case two questions have been made; 1st, Whether by the grand-father's return to *Darlington* there was an end to the certificate? I am strongly inclined to think that that was not an abandonment. If all the family had indeed removed back, that would have been an abandonment; but as his son was left behind, it was a sort of pledge that the certificate was not intended to be abandoned. It is not necessary however to determine upon that point, because on the other question I am prepared to give a decisive opinion. And my opinion is founded on the words and fair meaning of the statute 8 & 9 W. 3. c. 30. By the words of that act, the parish to which the certificate is granted, is obliged to receive the certificated person "together with his or her family." Now what is the fair legal import of the word "family:" it is true that in construing a will, and where it is the intention of the testator that it shall extend beyond "the immediate children," it may have that operation: but that is not the sense in which it is used in this act. In common parlance, the family consists of those who live under the same roof with the *pater-familias*; those who form (if I may use the expression) his fire-side. But when they branch out, and become the heads of new establishments, they cease to be part of the father's family. I admit that a certificate extends to the son, on account of the positive words of the act of parliament, he being a part of the father's family (a): but when he himself becomes the head of a family, then the words of the statute, public policy, and the convenience of mankind, require that he should no longer be considered as part of his father's family, or be protected by the certificate granted to his father. I am not alarmed at the argument that this tends to the separation of children from their parents; for that is usual with persons in that station of life, who, not being able to gain a livelihood at home, are obliged to go abroad into the world, either as servants or apprentices, after they have passed the age of nurture. It is as beneficial to themselves as it is to the community that it should be so; and their parents themselves will, if they judge rightly, form the same judgment. And this is not a singular instance in which children are taken from their parents; for in the case of parish apprentices, the children are put out by the parish officers, under the superintendence of magistrates, even without the consent of parents.

If this point had been before decided, as was supposed, I should have adhered to the decision; especially as, according to

(a) See also *R. v. Sherborne, Burr. S. C.* | *ingham, ib. 314.*  
282; *R. v. Bray, ib. 259*; and *R. v. Buck-*



the observation which Lord *Mansfield* frequently made upon these cases, certainty is essential for the guide of the justices of the peace, who are to carry these laws into execution. But I am not aware of any authority against our opinion; for I know that the *Taunton* case was not considered as deciding the point, that a certificate extends to grand-children; and this point was not made in *R. v. St. Mary Westport*. Giving full effect to the certificate as far as the words of the act, and the intention of Legislature, go, I think it meets with its boundary line, when it has protected the family of the certificated person (a); that is, all those who live with the *pater-familias*; and consequently that this grand-child, who was the son of the head of a distinct family, was not prevented gaining a settlement in *All Saints*, by hiring and service.

BULLER, J. This case gives rise to two questions; first, Whether the certificate were at an end by the grand-father's returning to *Darlington*; secondly, Whether grand-children be within the meaning of the certificate at all. On the first point; I think that the certificate was at an end by the grand-father's return; it was originally granted to him. The man, to whom a certificate is granted, is the person whom the Legislature had in view; and being granted to him according to the statute, it rightly includes his family; but his family are "those only who live with him." And as it happens in the course of time that some of the children separate from the father, if the father himself return to the parish granting the certificate, I think that the certificate is at an end as to all of them. On the second question, I perfectly agree with my Lord; and as he has gone into it so fully, I should not have added a word to what he has said, had it not been thrown out in the argument that a different opinion had prevailed in *Westminster-Hall* as well as in many parts of the country. I have often heard it observed by Lord *Mansfield*, and by other judges, that it would have been a fortunate thing for the public, if the Court, in deciding on settlement cases, had adhered to the strict letter of the acts of parliament, without entering into subtle disquisitions upon the subject, which only tend to perplex the generality of mankind. This case comes before us, without any decision upon the point to control our judgment. And therefore it must depend on the meaning of the several statutes, which I think is clear. The first is the

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(a) *Vid. R. v. Sudbury, Burr. S. C. 377, 8.*



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against  
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tants of  
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TON.

8 & 9 W. 3. c. 30; the object of which is stated in the preamble; "Forasmuch as many poor persons chargeable to the parish &c, where they live, merely for want of work, would in any other place, where sufficient employment is to be had, maintain themselves and families, without being burdensome to any parish &c; but not being able to give such security as may be expected upon their coming to settle themselves in any other place, they are for the most part confined to live in their own parishes, and not permitted to inhabit elsewhere, though their labour is wanted in many other places, where the encrease of manufactures would employ more hands" &c. Therefore it was intended that if a person, who from his education or habits of life could not get a comfortable subsistence in the parish where he was settled, thought he could support himself elsewhere, he should be enabled to go into such other parish, where he could procure a subsistence by his labour, &c. The statute then goes on to enact that the parish to which the certificate shall be granted "shall be obliged to receive and provide for the person mentioned in the certificate, *together with his or her family*, till they shall be chargeable, and then it shall be lawful for any such person, *and his or her children*, though born in that parish, *not having otherwise acquired a legal settlement there*, to be removed to the parish from whence such certificate was brought." This act is then confined to the person, to whom the certificate is granted, "together with those who reside with him;" the words are "together with his family;" namely, those "who constitute a part of his family at the time of the removal." Then, under this act of parliament, could the certificated man himself have gained a settlement in the certificated parish? I think he might; for the statute says, that when he is chargeable, he may be removed, "not having otherwise acquired a legal settlement there;" which necessarily implies that he might have gained a settlement in that parish, notwithstanding the certificate. And so the law stood till the passing of a subsequent act, 9 & 10 W. 3. c. 11.; by which it is enacted "that no person, who shall come into any parish with a certificate, shall be adjudged by any act whatsoever to have procured a legal settlement in such parish, unless he shall take a lease of a tenement of the value of 10*l. per annum*, or shall execute some annual office in the parish &c." But in this act there is not a word about the family of a certificated person; and it is therefore competent to the children to gain a settlement there by any of the means



means by which he could acquire a settlement before. But (I think) the true distinction is that so long as the children of a certificated person continue a part of his family, they cannot gain a settlement there; that is, they cannot gain a derivative settlement through him. And this is very much confirmed by the stat. 12 *Ann. ft.* 1. *c.* 18. *f.* 2., which, after reciting the burdens brought on certificated parishes by the servants and apprentices of certificated persons acquiring settlements there, enacts that no apprentice bound to, or servant hired by and serving with, a certificated person, shall thereby be adjudged to have any settlement in such parish. Now if the relatives of a certificated person were included in the stat. 9 & 10 *W.* 3., the statute of *Ann* was nugatory. But, inasmuch as the former act did not extend to apprentices and servants, it was thought necessary to add this clause in the 12 *Ann. c.* 18. to prevent their gaining settlements in the certificated parish. Therefore, considering this question on all these acts together, it seems perfectly clear. But two considerations have been urged to the Court, as probably productive of mischievous consequences from this construction of the statutes; First, it is said, that the children of a certificated person will be liable to be removed, as being likely to become chargeable: whereas, according to the present understanding of the act, they cannot be removed till they are actually chargeable. But that must be qualified in the way I have already mentioned. For I consider it thus, "that you cannot remove the son of a certificated person, while he remains a part of his father's family, until he becomes actually chargeable: but when he has quitted his father's family, and is domiciled elsewhere, he may be removed, as any indifferent person." The second inconvenience is, that persons in the same situation with these paupers will be removed, and thereby many of the mischiefs, against which the certificate act meant to guard, will happen: but that argument only applies to cases where a certificate has been granted. Whereas if the certificate act were to extend to the grand-children, and the remote descendants of a certificated person, the consequence would be that no certificates would be granted at all; which would be much more injurious to the public; for the reluctance, which at present prevails in different parts of the country against granting certificates would be greatly increased; and thus the object of the certificate act would be totally frustrated.

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against  
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tants of  
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TON.



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tants of  
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TON.

GROSE, J. Upon the first question, whether or not this certificate were abandoned, I wish to be understood as not giving any opinion: it is a nice question, and before I determine upon it, I should wish to have it argued. But in this case it is unnecessary to consider it. With regard to the other question, whether it were the intention of the Legislature to include grand-children in the certificate, I have no doubt. Without repeating all the reasons given by my brethren, I will only say that I am clearly of the same opinion with them; and on this short ground. The word "family" is used in the first part of the act; and therefore the operation of the certificate must be confined to the family of the person certificated. But grand-children are not, properly speaking, of the family of the grandfather, but of his son; for when the son becomes the head of a new branch, and has children of his own, he ceases to be part of his father's family; and his children then form a part of his own family. And that this was the intention of the Legislature also appears from the word "children" in the latter part of the same section, where it is used as synonymous with "family." It has however been objected that, by this construction of the act, the grand-children will be removed from their parents after the age of nurture; to which my answer is, that whenever such a removal is in contemplation, the father of those children may himself apply for another certificate for him, which will include his family.

Both orders quashed.

Saturday,  
June 23d.

The KING *against* The Inhabitants of EAST SHEFFORD.

Service for  
13 weeks  
dispensed  
with; though  
the pauper  
ran away  
without  
leave, was  
brought back  
by a justice's  
warrant, and  
consented to  
have a de-  
duction made  
out of his  
wages for  
that time.

TWO justices removed *John Mills* and *Phæbe* his wife from *East Shefford* in the county of *Berks* to *Welford* in the same county. The sessions on appeal quashed the order, and stated the following case. The pauper was hired by one *Stephen Birch* of *Welford* to serve him from *Michaelmas* 1790 to the *Michaelmas* following, at four guineas wages. He accordingly went to his master's on the day appointed, and continued there eight weeks, when he ran away, and was absent for thirteen weeks, during which time he worked with and received wages from another person. *S. Birch* then apprehended him by a warrant; but in his way to a justice asked him whether he would come back to his place or go to prison; and if he would come back and go on in his place as he ought to do, he might.

The



The pauper said he would come back: and his master asked him then what he should be willing to abate for the time he had been absent. The pauper said he thought one shilling a week would not hurt him, which was agreed to; and the pauper returned into his service, and continued till the end of his year, when he received all his wages, except the thirteen shillings which had been agreed to be deducted.

*Milles and Blackstone* in support of the order of sessions. In order to establish a settlement by hiring and service, there must be an abiding in the service throughout the year. Now here the servant, by an improper act of his own, left his master's service for thirteen weeks; therefore that was a complete abandonment of the service. But it will be urged that here was a dispensation of the service during that time by the master's receiving him again: but if the circumstances under which he was received be duly considered, they will be found to differ this case from others of the same kind which have been already determined. It may be observed that in none of them was the absence so considerable as here; and in all there is an implied forgiveness of the master for the absence. Whereas here the master apprehended the servant, and was in the act of taking him before a justice for the purpose of punishment; and insisted upon it as a preliminary condition before he received him again, that so much of what he had before agreed to give him should be deducted. This therefore amounted in effect to a new contract. The master so far forgave him as to be willing to take him again upon the same terms as before, but he would not consider him as a servant during the time of his absence. In *R. v. Nether Heyford (a)*, where a servant who had been absent for five weeks paid his mistress what he had earned during the absence, Lord *Mansfield* said "The sum deducted was not proportioned to the time of his absence; which would have been the measure of deduction, if the contract had been considered by them as totally dissolved and at an end, when he went away from her. But the paying her the exact sum that he had earned shews that these five weeks service was treated by them as a part of the service done to her." So that his Lordship thought that the deduction of wages (properly so-called) for the time of absence would have been a dissolution of the contract. In all the other cases of dispensation where some part of the wages was deducted in consequence of

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(a) *Burr. S. C.* 481.



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improper absence, it was done at the end of the service, and the acceptance of the servant again after his absence was unconditional, which it was not in this instance; and therefore this cannot be considered as a constructive assent to the departure, which was presumed in the other cases. From the circumstance of the servant's being received after an absence without previous consent, a presumption has been raised in many cases that the master was willing to dispense with the service during such absence: but here that presumption is rebutted by the master's conduct in taking up the servant on a warrant, and in deducting his wages for that time. So that the Court cannot say that the servant was constructively in his master's service, when the master has by his own act negatived it. The servant could not in an action have recovered his wages for the thirteen weeks, as was observed on a similar occasion in *R. v. Westmeon* (a); and if not, he could not, as against the parish, claim a settlement.

*Lane and Nares, contra*, were stopped.

LORD KENYON, Ch. J. If the old contract were dissolved when the servant absented himself, and a new one entered into on his return, I agree that the pauper could not gain a settlement by serving under it. And therefore the question is whether the service after the pauper's return were performed under the old or a new contract. This is one of the many cases, in which we have to regret that the words of the statute have been departed from: But as there is a series of adjudged cases, the principle of which applies to the present, it is too much for us to overturn them, though if the question were now to arise for the first time, perhaps we should make a different determination. It has been decided that absence at the beginning, the middle, or the end, of the year, may be dispensed with, either with the consent of the master or for an excusable cause. In *R. v. Hanbury* (b) it was held that an absence for a fortnight did not defeat the settlement, though the wages were deducted for that time. Now it is impossible to distinguish this case from that, in principle. It has been said, however, that the absence in that case was for a shorter period than in the present: but I wish that those, who used such an argument, would have drawn the line, and given us the *ne plus ultra*. Probably, if the first case after the statute had arisen upon an absence of thirteen weeks, the Court would have started at the question: but the

(a) *Cald.* 129.

(b) *Burr.* S. C. 322.



Court have gone on step by step, and having held that service for a fortnight may be dispensed with, I think we are bound by the principle of those cases to say that this pauper gained a settlement in *Welford* by hiring and service. For on his return he was received again into his master's service where he continued under the old contract. There is no pretence to say that he entered into a new contract; and the master's object, in apprehending him by a warrant, was to compel him to complete the service under the old contract.

BULLER, J. and GROSE J. of the same opinion.

Order of sessions quashed.

The KING *against* The Inhabitants of WHITTLESEA.

Saturday,  
June 23d.

**W.** SARELL, his wife and son, were removed from *Crowland* in the parts of *Holland*, in *Lincolnshire*, to *Whittlesea*, in *Cambridgeshire*: on appeal the order of justices was quashed, subject to the opinion of this court on the following case. The pauper *W. Sarell* for 12 years and upwards prior to and immediately before his removal to *Whittlesea* resided in *Crowland*; before which time he was legally settled in *Whittlesea*. During his residence at *Crowland* he was legally chosen an hogringer for the parish of *Crowland* for one year at a court leet for the manor of *Crowland*; he was presented by the jury for the said office, and was sworn therein and paid four pence for the oath; and he served such office two years on his own account. The duty of such office is to attend the open commons, to see that all hogs turned thereupon were rung, and such hogs as were not rung it was the duty of his office to take to the pound, which he frequently did; and he always received one penny for impounding, and sixpence for ringing each hog. The appointment to such office is of great antiquity, and serviceable to the inhabitants of the parish of *Crowland*. During the pauper's residence at *Crowland* he rented a house there of one *Allam*, at the yearly rent of eight guineas, for which he was to pay, and did pay, all taxes and rates &c. The case then set forth evidence, respecting the pauper's paying the taxes &c, but it did not satisfactorily appear whether or not he was rated.

A settlement was gained by serving the office of hogringer for the parish; it being stated that the pauper was chosen and sworn in at a court leet; and that it was an office of great antiquity and serviceable to the parish.

*Bower* and *Dauncey*, in support of the order of sessions, were stopped by the Court.



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*Erskine, Chambre, and Balguy, contra.* The place of an hog-ringer is not an office known to the common law: it is in its nature a private employment; and its duty is merely to take care that the hogs do not go on the commons unrung. It is like the employment of a shepherd, whose duty it may be to take care of the sheep of many individuals in the parish. But even if it can be called an office, it is not a public office within the act of parliament (a). In all the cases in which a settlement has been gained by serving an office, there has been a public duty annexed to it: whereas this is of a private nature. And though it is stated in the case to be an office of great antiquity in the parish, it must have originated in a bye-law, made at the court-leet by those individuals who had a right of common. In 1 Ro. Abr. 541. L. X. pl. 6. it is said that a person cannot be amerced at the leet for furcharging a common; and the reason given is because it concerns private interests, and not those of the public. So that for whatever length of time this office may have existed, as it merely concerns the interests of individuals, it is a private and not a public office.

Lord KENYON, Ch. J. It is stated in the case that this is an annual office of great antiquity, and serviceable to the parish at large; and that there is an oath of office. Therefore it seems to me that it is a public and annual office within the meaning of the act of parliament. Every employment in a parish is not indeed equal to express notice, though it be a matter of notoriety to the parish. It was once made a question whether shoeing the horses of the Lord of the manor was not equal to notice; but it was determined not to be equivalent. If this person had been hogringer to certain individuals only, he would not thereby have gained a settlement: but he was not merely an officer of A., B., or C., but of all the inhabitants of the parish. It has been held that a tithingman (b), a borsholder (c), an ale-taster (d) or a hayward, may gain a settlement by serving either of those offices; and the latter, whose duty it is merely to take care of the fences within his district, cannot be distinguished from this case.

Order of sessions confirmed.

(a) 3 W. 3. c. 11. s. 6.

(b) Sira. 444.

(c) Burr. S. C. 223.

(d) Ib. 365.



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The KING *against* P. BLEASDALE and Another.Saturday,  
June 23d.

THIS was a conviction on the statute of 5 *Ann. c. 14. §. 4.* for using a greyhound to destroy game, without being qualified; for which the defendants were convicted in 5 *l.* each; which

Two persons cannot be convicted in separate penalties under 5 *Ann. c. 14. §. 4.* for using a greyhound to destroy game.

The Court, without hearing any argument, said could not be supported; for that it was only one offence; and that the magistrate should only have convicted them in one penalty. That this question depended on the 5 *Ann. c. 14. §. 4.* which enacts "that if any person or persons, not qualified &c, shall keep or use any greyhounds &c, to kill and destroy the game, and shall be thereof convicted &c, the person or persons so convicted shall forfeit the sum of five pounds." And they said that this point had been several times decided; in *Hardman v. Whitacre (a)*, and in others.

Conviction quashed.

Wood, in support of the conviction.

Chambre, *contra*.(a) *Bull. N. P.* 189.The KING *against* PICKERILL.Monday,  
June 25th.

ON a *quo warranto* information against the defendant, as a burgess of *Newcastle-under-Lyme*, a verdict was found for the relator on all the issues; on which judgment of ouster was entered up, "and that the defendant, in order to satisfy our said lord the king for and on account of the usurpation aforesaid, be taken &c; and that *J. Wilkinson* (the relator) do recover against the defendant 180 *l.* for costs &c." On which a writ was issued requiring the sheriff of *Staffordshire* to take the defendant &c, "to satisfy us, concerning his redemption, by reason of his claiming to have, use, and enjoy, the office of a burgess &c;" and this writ was indorsed thus "allowed for for costs 180 *l.*"

A defendant, in execution for the contempt, and for the costs, on a *quo warranto* information, may be discharged under the lords' act.

*Bower* obtained a rule, on a former day, calling on the relator to shew cause "why the defendant should not be discharged out of the custody of the sheriff of the county of *Stafford*, on payment of a small fine for his redemption by reason of the premises whereof he stands convicted in this cause;" and he

stated



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stated that the object of his motion was to enable the defendant to take the benefit of the Lords' Act, at the next assizes, as to that part of the execution which related to the costs.

*Leycester*, who now opposed this rule, said he had no objection to the defendant's being discharged out of custody as to that part of the execution, which related to the contempt, but insisted that this rule could not be supported, because there was no pretence now to discharge him as to the other part, respecting the costs. On this ground

*The Court* agreed that the rule must be discharged; saying however that the fine to the king in such a case was merely nominal, and that that would be no objection to the defendant's being discharged out of custody under the Lords' Act, as to the execution for the costs, which was now considered as an execution in a civil suit (a).

Rule discharged.

(a) *Vid. R. v. Stokes, Cowp. 136; and R. v. Myers, ante 1 vol. 266.*

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### The KING against BELLRINGER.

Where a charter required that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, should elect; and the common council was a definite body consisting of 36; held that a majority of the whole number must meet to form an elective assembly; and that if the corporation be so reduced as that so many do not remain, no election can be had at all.

AN information in nature of a *quo warranto* was filed against the defendant, calling upon him to shew by what authority he claimed to be a capital burghess of the number of twenty-four, in the borough of *Bodmin*. The plea set forth that *Bodmin* was an ancient borough, and was incorporated by the name of the mayor and burghesses of the borough of *Bodmin*. That there ought to be twenty-four capital burghesses of the number of twenty-four, and that the office was an office of trust, touching the government of the borough, and the administration of public justice. It also set forth a charter of the 5th of *Elizabeth* incorporating the borough by its ancient name, and ordaining that there should be twelve capital burghesses and counsellors of the borough, and twenty-four other capital burghesses of the number of twenty-four, which twenty-four together with the twelve should be the common council for the government of the borough, and for assisting the mayor for the time being. And another charter of the 36th of *Elizabeth*, whereby she granted that the mayor and thirty-six capital burghesses being the common council of the borough, together with the common clerk

for



*for the time being (a), or the major part of them, from time to time and in all times to come should yearly, viz. on 24th September, choose one honest man of the number of the twelve capital burgeses at that time in the borough inhabitant, who should be mayor for a year following, and that he after his election and before his admission should take his oath of office before the last mayor, in the presence of the aforefaid thirty-six capital burgeses for the time being, or the major part of them. And that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, should elect all the officers and ministers of the borough; and that such officers and ministers should be sworn in before the mayor and common clerk, and the common council for the time being, or the major part of them. And in case of the death or amotion of the mayor for the time being within the year, that it might be lawful for the said common clerk and thirty-six capital burgeses, being the common council of the said borough, or the major part of them for the time being, to elect one of the aforefaid twelve capital burgeses to be mayor, and that he should take his oath before the common clerk and capital burgeses, or the major part of them. It then gave power to the mayor and common council for the time being, or the major part of them, to commit or fine such as refuse to serve the offices. And if it should happen that any of the aforefaid capital burgeses for the time being, or any other officer &c, for the time being, or any burges of that borough, in their functions should misbehave or commit any crime for which he should be thought worthy by the sentence of the mayor and thirty-six capital burgeses, or the major part of them for the time being, from his office to be removed, then and so often it should be lawful for the aforefaid mayor and thirty-six capital burgeses, or the major part of them such person &c. to amove. The plea stated the acceptance of these charters; and that on 25th June 1790 there were only six capital burgeses and counsellors, and only twelve capital burgeses of the number of twenty-four, then living and surviving: and that on the same day the defendant was elected one of the twenty-four by a majority of the then capital burgeses and counsellors, and of the then capital burgeses of the number of twenty-four, &c; by reason of which &c; and so claimed title. To this it was replied, 1st, That from the granting of the letters patent in the 36th Elizabeth hitherto a*

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(a) In this and all other parts of the charters where these words occur the original is abbreviated *pro tempore existent*.



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certain usage and custom touching and concerning the election of the said officers and ministers in those letters patent mentioned hath prevailed within the said borough, viz. that during all the time aforesaid nineteen at least of the said mayor, common clerk and common council, in those letters patent mentioned, have been used and accustomed, and ought to assemble themselves and meet together, and have during all the time aforesaid assembled themselves and met together, at every election of the said officers and ministers or any of them in those letters patent mentioned, except at the said supposed election of the said defendant in the said plea mentioned, viz. at &c; concluding with a verification (a). 2d Replication, That from the granting of the said letters patent of 36th of *Elizabeth* hitherto a certain usage and custom, touching and concerning the election of the said officers and ministers, in those letters patent mentioned, hath prevailed within the said borough, viz. that during all the time aforesaid, no election of any of the said officers or ministers hath been nor ought to have been had or made by a less number than nineteen of the said mayor, common clerk, and common council in those letters patent mentioned; and that during all that time, whenever a less number than nineteen of the said mayor, common clerk, and common council, have assembled and met together for the purpose of electing any of the said officers or ministers, such assembly and meeting hath during all the time aforesaid been used and accustomed to be and ought to have been broken up and dissolved, and such intended election omitted and postponed for want of a sufficient number of the said mayor, common clerk, and common council, to proceed to such election, to wit at &c. The 3d Replication stated the custom to be, that every election of any of the said officers or ministers in those letters patent mentioned should be had or made by nineteen at the least of the said mayor, common clerk, and common council &c. To each of these there was a general demurrer and joinder.

This case was first argued in last *Hilary* Term by *East* for the demurrer, and *Gibbs contra*, and in this term by *Bower* for the demurrer, and *Morris contra*.

(a) On the first argument the Court being of opinion that at any rate this usage was not well pleaded in the replication, because for ought appeared to the contrary the fact of a smaller number than nineteen having met for the purpose of election, and attempted in vain to make an election, had never occurred, leave was given to amend the pleadings, and the two other replications were added before the second argument.

Arguments



Arguments in support of the demurrer. Two questions arise on this record; 1st, As to the usage which is pleaded to control the construction of the charter. 2d, As to the true construction of the charter, independently of the usage. 1. The attempt to plead an usage in this manner is perfectly new, and therefore very questionable on that account alone. It cannot be supported either on principle or precedent; usage at most is no more than evidence of some general law or contract; and no matter of mere evidence can be pleaded. In the case of contracts no parol evidence can be admitted if the contract itself exist; neither can it in the case of an existing charter; but if this be admissible, it will be letting in parol evidence indirectly of what cannot be done directly. Usage may be given in evidence of ancient prescriptions in a corporation, which presuppose a charter; but it cannot be pleaded as the evidence of such a charter, nor is there any case where it has even been admitted as evidence of a charter acknowledged to exist; because it would be admitting secondary evidence; and if not, *a fortiori* it cannot be pleaded. If such an usage be pleadable, when does it begin to have legal existence? There is no limitation of time known to the law; its advances are gradual from the moment of the charter being granted; and if this replication be sustainable, an usage of a week old may equally be pleaded to control the meaning of a charter; which would be manifestly absurd. Besides it is permitting the grantees to construe the king's charters instead of his courts of law. The consequences of this would be highly inconvenient; it would tend to introduce confusion. The same words might have a different construction put on them in different places. The mischief would extend still further. If charters may be thus construed by those who act under them, so may deeds and acts of parliament. The attempt indeed was once made to construe the 43 *Eliz.* relative to the rating of personal property by the usage which had prevailed under it, but that was found to be so contrary in different parishes, that no further notice has been taken of such an argument since. But cases may be cited where evidence of usage has been adverted to by the Court in construing charters; such as *Rex v. Varlo*, *Cowp.* 248.; *Blankley v. Winstanley*, 3 *Term Rep.* 279.; and *Gape v. Handley*, *M.* 17 *Geo.* 3. there cited. But upon all those and other cases to the like effect these observations may be made; that where the usage has been adverted to, it has been as evidence of something else, as of a charter, and not as a substantive fact

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of itself, such as it is here pleaded. It has also been admitted not as evidence of an usage since, but before, the charter, which was the subject of consideration: and as the corporation claimed rights by virtue of the usage which presupposed a former charter, the only question has been, whether the words of the subsequent charter have been explicit enough to overthrow the former usage. Again where recourse has been had to it at all, it has been to preserve the corporation and not to destroy it, as it is attempted now. In the next place, even where the usage has been on the same side to which the Court leaned in the construction of the charter, they have expressly waved it as the ground of their opinion, and only adverted to it as confirmatory thereof. But if on the words of the charter itself they have been of a different opinion they have always treated the usage with neglect, and disavowed it's being binding upon them: and it has been often said, that where the words of a charter were plain, usage could not alter them; if doubtful, they might be explained by it. This furnishes another strong objection to the replication: for it is a clear rule in pleading that no matter can be pleaded, which, admitting it to be true, is inconclusive: and it will not be pretended that if the Court, independent of the usage, would construe the charter one way they are bound by force of the usage to construe it another. This brings the argument to the true and only question, namely, whether by the true construction of the charter of the 36th *Eliz.* a majority of the whole number, or only of the existing body of the corporation, are necessary to form an election to the office held by the defendant. The words, on which that question more immediately turns, are "that the mayor, and the common clerk for the time being and the common council for the time being, or the major part of them, should elect all the officers and ministers," &c. The corporation consisting of the mayor and thirty-six capital burgesses, it is contended on the other side that *the major part of them* must mean the major part of the whole body, consisting of the definite number of thirty-seven; and consequently that no less than nineteen can form the election. But the words before used "for the time being" necessarily refer to the existing body at the time; and therefore *the major part of them* must mean the major part *for the time being*, or of the existing corporation. This is the plain grammatical construction; a construction the more proper, because, as Lord Coke says (a), the king's grants ought

(a) 2 Inst. 497.



to have a liberal and favorable construction, *usque ad plenitudinem*. But even if that were more doubtful than it is, it is an excellent rule for the construction of charters to expound doubtful phrases by other parts of the charter. Now to shew that these words *for the time being* refer to the *existing* state of the corporation, it is only necessary to advert to that part of the charter which provides for the election of another mayor upon the death or removal of one within the year; and there the election is ordained to be made by the common clerk and thirty-six capital burghesses *or the major part for the time being*. No words can express a stronger reference than these to the existing body. And that the majority referred to by the charter must be taken to mean *the major part for the time being*, although not so directly expressed, is further evident from the clause relative to the removal of the officers and ministers for misbehaviour, which is to be "if thought worthy by the sentence of the mayor and thirty-six capital burghesses, or *the major part of them for the time being*, &c, to be removed"; and yet it is expressed that the actual removal in consequence thereof shall be by the "mayor and thirty-six capital burghesses *or the major part of them*." Now if *the major part of them* referred in this charter to the original, and not to the existing, number, this gross absurdity would follow, that a less number might judge of the propriety of the removal than was necessary to do the ministerial act of removing: and those words are not so strong as the clause in question, where the words, *for the time being*, immediately precede *or the major part of them*. In order therefore to make the charter consistent and sensible, the construction contended for by the defendant ought to prevail. But as it is only pretended that the usage ought to be called in aid of the construction, where the meaning of words in a charter are doubtful; and as it cannot be contended that words can any longer be said to be doubtful, whatever they might have been thought to be originally, after a precise legal meaning has been affixed to them by a court of law, these words can no longer be argued to be doubtful, having been already interpreted by this court, in the case of the *King v. Grimes* (a), supported by other authorities. One of the questions there was, whether *John Leigh* who presided as mayor at the defendant's election was a good mayor, the election of a mayor to be by *the mayor and eleven capital burghesses for the time being* (b), or *the major part of them*; which is the same expression

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(a) 5 Burr. 2598.

(b) *Pro tempore existens*. as in this case.



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as occurs in this case. That charter afterwards stated that they should assemble at the *Guildhall*, and that the major part of them *then there assembled* should elect. There were at that time only eleven capital burgesses, including the mayor, existing; and *Leigh's* election was made by four only, who were assembled at the *Guildhall*, in the absence of the rest. The Court held the reasonable construction of the charter to be, that the mayor and a major part of the *subsisting* burgesses should meet to form the election. Now the major part of the *subsisting* body would have been six; whereas seven were necessary to make a majority of the whole number.

[BULLER, J. remarked, that *Aston, J.* had said, in that case, that though a majority of the subsisting body was sufficient to form the election when met, yet that there still must remain enough of that subsisting body to form a majority of the whole body when the corporation was full.]

To this it was answered that whatever opinion *Aston, J.* might have thrown out in that case upon the subject, it does not appear that the rest of the court adopted it: indeed in the printed report, their reasoning, which is stated to be the reasoning of all the judges, proceeds upon a different foundation. And in two subsequent cases, *Aston, J.* himself seems to have adopted a different opinion; first in *R. v. Varlow, Cowp. 248.* where the election of mayor being by the mayor, aldermen and burgesses *or the greater part of them*, *Aston, J.* and the rest of the court expressly declared their opinion that an election by the major part of those assembled was sufficient, although it might not form a majority even of the subsisting body; that being indefinite. There too, the words *for the time being* were wanting, which makes it stronger than this case. And those very words were afterwards strongly relied on by *Aston, J.* in *Rex v. Monday, Cowp. 538*; who in answer to a question of Lord Mansfield, whether in a case of a definite body a majority of the whole number was not necessary to constitute an election, answered that it was so conceived in *Rex v. Reese*; and *Rex v. Newsham*; but that in the case before them *the words seemed to confine it to a majority of the members for the time being*. And there the words referred to were exactly the same as these. The question of construction therefore seems entirely concluded by these authorities.

Against the demurrer, it was insisted to be hardly necessary to refer to the usage at all, the words of the charter itself being plainly



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plainly against the defendant; but if they were only proved to be doubtful, and to be capable of either construction, then the usage was a proper and legal expositor of them; and being so, was properly put upon the record. First, it was contended that the construction of the charter would be uniform, consistent, and sensible, by referring the words *for the time being*, upon which the main stress is laid, to the different individuals of whom the corporation might be composed in after times from the granting of the charter. Those words can have no other signification in many parts of the charter; as where applied to the mayor, or common clerk, *for the time being*; that is the mayor &c, whoever he may happen to be at such a time. If that be so with respect to those officers, the same words ought to have the same construction, when applied to the other members of the corporation, namely, the body composed of twelve, and that of twenty-four. These are expressly directed to form the common council of thirty-six. Each of the persons there named was first to take upon him one of these offices; and when the charter directs how the elections shall be made in after-times, it naturally, though perhaps superfluously, describes those bodies with the addition of the words "for the time being;" meaning no more than in the other cases before alluded to, that those who for the time being filled those thirty-six offices, which formed the common council, should elect. If the charter be read with this view, all the difficulties started on the other side are removed at once; and the same words will have the same construction throughout the charter, which will not be the case according to the construction contended for by the defendant. In several parts of the charter, where the words "*for the time being, or the major part of them*," occur, it is with express reference to the common council, as consisting of thirty-six; as in the election of mayor &c. Now the major part for the time being of thirty-six can have but one interpretation. With respect to the *King v. Grimes* (a), it may be observed, that this point was never agitated there. It was enough to say that at all events the election had not been made even by a majority of the *subsisting* body; and the expressions there made use of have a reference to that fact. Besides what has been stated by *Buller, J.*, as said by *Aston, J.* in that case, is decisive against the defendant. And in the *King v. Varlo* (b), the Court expressly took the distinction between corporations consisting of a definite and an

(a) 5 Burr. 2598.

(b) Cowp. 248.

indefinite



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indefinite number ; in the former they considered it necessary for a majority of the whole body to meet in order to form the election ; though when such a majority were met, a majority of those might do the act. What is there said in the argument by *Wallace* respecting the *King v. Grimes*, which was recent and in the recollection of the Court and bar, is confirmatory of Mr. J. *Buller's* note of it. Arguing upon the distinction above alluded to he says " But if the number of the electors be *definite*, as in *Grimes's* case, there the majority of the *whole* body must first meet, and then the major part of those so assembled may elect." This statement of that case is not denied by the Court, and is conclusive. With respect to what is supposed to have been said by *Aston, J.* in *Rex v. Monday (a)*, it is singular enough that he should refer to *Rex v. Reese*, and *Rex v. Newsham*, as confirmatory of the idea, that if a majority of the whole of a definite body were not left, the corporation would be dissolved, and yet suppose a difference in the case before him from those, because of the words *for the time being* ; for upon reference to the paper book in *Rex v. Newsham*, it appears that the election was under a bye law, which directed that the mayor and common council *for the time being*, or the major part of them, should elect. There must therefore be some mistake in that point : at all events it is no more than a loose suggestion ; without expressing any opinion upon the subject. But the distinction between a definite and an indefinite body in this respect is founded upon older authorities than these ; *Freem. 504. 6 Vin. 269* ; where many authorities are collected, as well respecting the legal operation of usage to construe grants and charters, as to this point ; amongst others a case of the *Queen v. Lock, M. 6 Ann. B. R.* where it is said, that if an act to be done refer to the constituent members of a corporation, nothing can be done but by a majority of those who are the constituent parts of the corporation : but where a thing is referred to be done by the commonalty, there the majority of those present, all being duly summoned, will bind the rest. And in the preceding section it is said, that if a corporation consist of thirteen, there ought to be seven to form a chapter, though the majority of those seven will bind. Next, if the Court still think the words of the charter doubtful, it cannot be denied but that they may look at the usage by which to construe them. It is true that most of the authorities on this subject are where the

(a) *Cowp.* 537.



questions have turned upon the propriety of admitting evidence of usage at *nisi prius*. But if that point be established it will greatly advance the last head of argument. In 2 *Inst.* 282. it is said that charters ought to be construed as the law was taken when the charter was made, *and according to ancient allowance*. And Lord *Coke* afterwards says "if the words were *general*, and a continual possession pleaded of the franchises claimed, or if the claim were *by old and obscure words*, and the party in *pleading*, expounding them to the Court, and averring continual possession *according to that exposition*, the entry was &c." This is not only an authority for receiving ancient usage as an exposition of charters, but also for pleading such exposition; and he concludes with referring to the old rule *optimus interpret rerum usus*. In *Vaugh.* 169. it is said by the Court, that "where the penning of a statute is dubious, long usage is a just medium to expound it by; for *jus et norma loquendi* is governed by usage. And the meaning of things spoken or written must be, as it hath constantly been received to be, by common acceptance." Then how have these words been constantly construed at *Bodmin*? From the first grant of the charter they have had the construction contended for on the part of the crown; a construction which the words themselves at this day plainly warrant. So Lord *Hardwicke* in 3 *Atk.* 577 says "in the construction of ancient grants and deeds there is no better way of construing them than by usage; and *contemporanea expositio* is the best way to go by." There the usage arose after the grant, which is an answer to one objection urged by the other side. Again in *Rex v. Varlo* (a), *Blankley v. Winstanley* (b), and *Gape v. Handley* there cited, usage was expressly referred to, as a medium by which to construe charters. In *Atkins v. Davis* (c), *Asbburst* and *Buller*, Justices, both refer to usage as a proper expositor even of acts of parliament, where the words are doubtful. If therefore usage may be received in evidence, no reason can be stated why it should not be pleaded; for it is not open to the objection urged against it of pleading only evidence; for usage consists of a repetition of acts; it is therefore the result of those acts which are pleaded, and upon the operation of which the Court are called upon to decide. This they can as well do when put upon the record by way of plea, as if found on a special verdict. The demurrer, by admitting the fact here, brings the question before the Court exactly the same as if it

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arose on a special verdict; and though it be put upon the record, it will not make it material, if by law it is not so. It is a general rule in pleading that whatever may be given in evidence under the general issue, where a general mode of pleading is allowed, may be specially pleaded in a case where special pleading is required. The authority before cited from 2 *Inst.* tends to shew the propriety of this mode of pleading; and convenience and justice are on the same side.

In reply it was said, that Lord *Coke* in 2 *Inst.* 282. was speaking particularly of old obsolete words, the meaning of which had become doubtful by lapse of time; but not of such plain words as are in common use. And there the evidence was admitted in order to shew what the parties meant at the time; whereas the usage here pleaded is admitted to have arisen subsequently, and not to be co-existent with the charter to be construed. The same answer applies to the case in *Vaugh.* 169. The case of *Atkins v. Davis* cannot bear very strong upon the point; because if the usage of each parish were to be of any avail, the act of the 43 *Eliz.* relative to the rating of personal property would be construed differently in different parishes: But that can never be admitted. The usage referred to in these and other cases must be such as was mentioned in *Rex v. Eriswell*, ante 3 vol. 707. namely, a legal usage, the general understanding of the courts of law upon any dubious words in an act of parliament. And that is the only usage which can be adverted to for the construction of charters: but that is the subject of argument and knowledge, and not of pleading. All the other cases mentioned, where usage has been received, have been instances of prior usage, forming part of the constitution itself of the corporation, and not admitted to have arisen since the charter which it was to construe. At most it has been taken as confirmatory of the construction which the Court put upon the charters themselves. The only case, which seems to go further, is that in 3 *Atk.* but it must be remembered that that was in equity, where the judge requires his conscience to be informed before he exercises his judgment. At any rate the usage here pleaded refers to a different state of things from the present, namely, when the corporation was full: and it is no more than this, that when the corporation consisted of thirty-seven, the usage was for nineteen at the least to assemble. But by the same sort of usage, when the corporation consists of less than that number, a majority of the existing body is sufficient. With respect to the authorities cited as to the construction, tending to shew



shew that in the case of a definite body the majority of the whole body must assemble, there is all the difference possible between those cases and this; for here are the words *for the time being*, which apply to the *existing* body, and are not to be found in those cases. For with respect to what has been observed upon the case of *Rex v. Newsham*, it is plain that *Aston, J.* in *Rex v. Monday* conceived that such words did not there occur, and that they made an important difference: and though such words did really occur in the *King v. Newsham*, that will not abate the force of *Aston's* remark, because he conceived otherwise at the time, and that case was determined on another point. Then as to the construction of the words *for the time being*, the argument on the other side tends to prove them surplusage, which cannot be where words are sensible, and have a well known acceptance. And it is plain that when the common council for the time being are referred to, the charter cannot be taken to speak of them as composed of thirty-six in all cases, for it expressly puts the case of one of them dying; and therefore it must mean to speak of them as the bodies called the twelve, and the twenty-four. Thus if several vacancies happened by death in the latter body, the remainder would still remain capital burgesses of the number of twenty-four. It is only their corporate description. Upon the whole, as the construction contended for by the defendant will preserve the corporation, and the contrary one destroy it, the Court ought, even if the matter were doubtful, to give the king's grant the most liberal construction.

*The Court* took time to consider of this case; and now

Lord KENYON, Ch. J. delivered their unanimous opinion.

Two great questions were made in the argument of this case. The first on the validity of the replications, which state a custom that has prevailed in this borough since the granting of the charter in the 36th year of the reign of Queen *Elizabeth*. I shall dispose of this question by laying it out of the case, because our judgment is given upon the other point. That contemporaneous usage has always been considered as of great importance in the construction of charters a variety of cases at all times abundantly evince. But the manner of putting this on the record is perfectly novel. It has been argued very much at length: but as there may be considerable doubts about it, and as we are not called upon to decide whether or not the usage be well pleaded in this case, we wish to avoid giving any opinion upon the subject.

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On the second question, on the fair construction of the charter, we have no doubt. The Queen, when she thought fit to grant this charter, granted it to a body, consisting in the whole of thirty-seven, a mayor, twelve capital burgessees and counsellors of the borough, and twenty-four other capital burgessees, somewhat subordinate, for the government of the borough. The defendant's argument supposes that any number of the corporators (however reduced that number may be) are competent to do the several acts for which the corporation was created; and that all acts done by a majority of the corporators, though reduced, are valid. Without viewing this charter with the eye of a lawyer, it cannot be supposed that the Queen ever intended that any small number of the corporation, however minute, would be sufficient for the purposes for which the charter was granted; and that the survivors, by refusing to fill up the vacancies as they happened, might monopolize the whole government of the borough to themselves. A question lately arose in another corporation in this very county, where the number of corporators was reduced to two or three, who claimed the exclusive privilege of electing members of parliament for the borough. When the case came before us, we were staggered with the proposition that those were still legal corporators: and after argument we decided that they had no title, and gave judgment of ouster against one of them (a). Even without the assistance of any authority upon this point, I could never have thought that the whole government of the borough could devolve on so minute a number as two or three; and yet, if the defendant's argument were to prevail in this case, the consequence that it might so devolve would necessarily follow. But the cases which were cited in the argument of this case are all one way, that there must be a major part of the whole number, constituted by the charter, in order to make the elections, and to do the several other acts, under it. In *R. v. Varlo* (b) Lord Mansfield observed upon the distinction, which is extremely well founded, between corporations consisting of a definite and an indefinite number; that in the latter a major part of those who are existing at the time is competent to do the act, but that where the body is definite (as it is in this case) there must be a major part of the whole number. His Lordship's words are "Upon the words of the charter alone, I myself have no doubt about the construction of it. In this corporation there are an indefinite number of freemen; and it is a corpo-

(a) *Ante* 3 vol. 19.(b) *Cowp.* 250.



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tion in which honorary freemen may be made. It is in the nature of all corporations to do corporate acts; and where the power of doing them is not specially delegated to a particular number, the general mode is for the members to meet on the charter-days, and the major part who are present do the act. But where there is a select body, it is a different thing, for there it is a special appointment. All the reasoning therefore is different." It appears to me therefore that it was his opinion, and that of the Court, that where there is a definite body, there must exist at the time when the act is done a major part of that definite body: it is not necessary indeed that they should all concur in the election, or other act done; but they must be present; and the election at such meeting is in point of law an election by the whole. In the case of *R. v. Monday* (a) Lord Mansfield asked this question, "Is there any case where the charter has directed the election to be by the majority of the body, in which it has been held that a less number than a majority of the whole corporate body can elect? For instance, suppose the corporate body consisted of twelve, and two were dead; is there any instance where the charter has said that the election shall be by a majority of the body, in which it has been held that six, which are a majority of the remaining ten, were sufficient to elect." This question was immediately answered by *Aston, J.*; who said that, "In *R. v. Reese*, and *R. v. Newsham*, it was clearly understood that if the major part of the corporation had been dead, it would have been in fact dissolved, or at least those who survived could not have assembled for the purpose of an election." Now those cases referred to underwent perhaps more discussion than any case agitated at that time; and Mr. J. *Aston*, who cited them, had the conduct of those causes, and therefore intimately well knew what points had been made in the argument, and the grounds on which the Court proceeded in giving judgment, as well as the opinion of the Court upon every point canvassed in the causes, though not expressly decided. The same doctrine was again entertained by this Court in *R. v. Grimes* (b). And we do not find a single decision in opposition to all the cases, considering that this election should have been made by a select definite body.

Therefore on the words of the charter of *Elizabeth*, on the intention of the queen in granting it, as it is to be collected from thence, and on these authorities, we are all of opinion, that the defendant's was not a legal election, because at the time

(a) *Cowp.* 537.(b) 5 *Burr.* 2598.



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when it took place there was not a major part of the select body then in existence.

The KING  
against  
BELLINGER.

Judgment for the King.

Tuesday,  
June 26th.

SHERSON against OXLADE.

If a bond and warrant of attorney to confess a judgment be given to secure an annuity, and the judgment be entered up before the memorial is registered, the judgment need not be inserted in the memorial under the 17 Geo. 3. c. 26.

THE defendant having given the plaintiff a bond and warrant of attorney to confess a judgment, for securing an annuity, the latter entered up judgment, but did not insert that judgment in the memorial; on which ground

*Erskine* and *Bower* obtained a rule to shew cause why the judgment, and the execution thereon, should not be set aside, contending that the judgment was an assurance, which ought to have been registered under the annuity act 17 Geo. 3. c. 26.

*Russell* shewed cause against the rule. It is not necessary to register more than the securities given by the party himself, which are the acts of the party. Now here the only acts of the defendant were the executing the bond and warrant of attorney; the entering up the judgment is the act of the grantee; and that in many cases is not done till the memorial is registered. If it be necessary to register the judgment, it is equally necessary to register the execution: but that was never contended for. Neither is it within the reason of the act, which required the memorial of the annuity deeds for the purpose of notoriety: for a judgment is sufficiently notorious without it. The requisites of the statute do not apply to a judgment; for the act requires the names of the witnesses and other formalities to be set forth, which shews that the Legislature only looked to private instruments usually authenticated in that manner.

*Per Curiam.* This is not one of the assurances which the Legislature intended should be enrolled. The contract for the annuity was made by giving the bond and warrant of attorney to enter up judgment. Those were the securities on which the party relied; and the act is complied with by registering all the securities given by the parties. This will sufficiently answer the purpose of notoriety; for every person may see, by referring to the memorial, that the plaintiff was at liberty to enter up judgment whenever he pleased. If the memorial had been made immediately after the execution of the bond and warrant of attorney, the judgment could not have been inserted in it. Then whether a matter shall or shall not be registered cannot

depend



depend on an act which is to be done afterwards. If indeed the only security had been a judgment actually entered up, perhaps it would have come within the provisions of the act: but the assurances of this annuity were the bond and warrant of attorney.

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SHERSON  
against  
OXLADE.

Rule discharged.

MACDONALD *against* BOVINGTON.Wednesday,  
June 27th.

THE plaintiff drew a bill of exchange for 20*l.* on the defendant, which the latter accepted; and which afterwards got into the hands of *Thompson*; who recovered against the defendant, as acceptor, and charged him in execution. The defendant having obtained his discharge under the Lords' Act in that suit, *Thompson* then sued this plaintiff as drawer, and recovered the amount of the bill; on which the plaintiff sued the defendant, on his acceptance, and charged him in execution. It was contended, on a rule to discharge the defendant out of custody, that he had satisfied the debt by being charged in execution at the suit of *Thompson*, and that he was not liable to be sued again for the same sum. But

The holder of a bill sued the acceptor, and charged him in execution; the latter having obtained his discharge under the Lords' Act, the holder then sued the drawer, who, after paying the bill, sued the acceptor, and charged him in execution, which was held to be regular; the defendant's having been charged in execution, at the suit of the holder not being a satisfaction as between the drawer and acceptor.

Lord KENYON, Ch. J. said, nothing could be clearer than that this was not a satisfaction of the debt as between these parties though it was as to *Thompson*. That it was a mere formal satisfaction, even to the holder, not like actual payment. That this plaintiff, having been obliged to pay the amount of the bill since the defendant was charged in execution at the suit of *Thompson*, had a right to have recourse to this defendant as acceptor; for that, by his payment, a new cause of action arose against the defendant, which he might enforce without regard to what passed in the former action.

BULLER, J. The consequence of the defendant's not being liable in this action would be this, that, because the drawer was obliged to pay the holder of the bill, the acceptor would be discharged without paying either.

*Bower* in support of the rule. *Mingay, contra.*

Rule discharged.

END OF TRINITY TERM.



31/10/1910

IN THE UNITED STATES OF AMERICA

Know all men by these presents, that I, the undersigned, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the said Court.

Witness my hand and seal this 1st day of October, 1910.

Attest my hand and seal this 1st day of October, 1910.

Notary Public for the State of New York.

My commission expires the 1st day of October, 1911.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1st day of October, 1910.

Notary Public for the State of New York.

My commission expires the 1st day of October, 1911.



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PRINCIPAL MATTERS  
In the FOURTH VOLUME.

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4. An affidavit taken before a judge at *Nisi Prius*, upon an information issuing out of this court, which affidavit was returned here, is considered as taken under the authority of the court, and they will take cognizance of the contents; and grant an information thereon. *R. v. Jolliffe. Trin. 31 Geo. 3. Page 285*
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  6. When a defendant, who has suffered judgment by default in a criminal prosecution, is brought up for judgment, each party should come prepared with affidavits disclosing his own case (if he mean to produce any); but if in the course of the inquiry the court wish to have any point further explained, they will give the defendant an opportunity of answering it on a future day.] *R. v. Wilson. Mich. 32 Geo. 3. 487*
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1. Fraud will vitiate any transaction, though the principal person interested do not personally take any part in the fraud; for the principal is civilly responsible for the acts of his agent. *Doe d. Willis v. Martin. Mich. 31 Geo. 3. 39*
2. If an agent, employed by the indorsee of a bill to get it discounted, warrant it to be a good one, his employers are bound by his act, and are liable to refund if the bill be afterwards dishonoured by the acceptor. *Fenn v. Harrison. Hil. 31 Geo. 3. 177*
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### AGREEMENT.

1. An insolvent assigned over his effects for the benefit of his creditors; and in the deed there was a proviso that the shares of those creditors who did not execute it before a given day should be paid to the insolvent; an agreement made between the insolvent and a creditor even after that day that the latter should sign the deed and the former pay the remainder of the whole debt is fraudulent and void. *Jackson v. Lomas. Hil. 31 Geo. 3. Page 166*
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### ANNUITY.

1. A memorial of a warrant of attorney given to confess a judgment, in order to secure



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- Secure an annuity, must be registered under the annuity act, 17 Geo. 3. c. 26. *Hopkins v. Waller. Mich. 32 Geo. 3. P. 463*
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3. If an order of removal be, on appeal, confirmed by a majority of the justices present, and it be afterwards determined, on a question reserved for the opinion of this court, that so many of them were disabled to vote as to reduce the number to a minority, this court will not quash the original order, but will send the case back to the sessions, directing them to enter a continuance to the next sessions, in order that they may quash it. *ib.*
4. By an inclosing act an appeal was given to the next sessions within six months after the cause of complaint; an appellant moved the court of sessions in due time to receive and respite his appeal to the next sessions, which was refused; and this court would not grant a mandamus to the sessions to receive it. *R. v. Justices of Derbyshire. Mich. 32 Geo. 3. 488*
5. By 17 Geo. 3. c. 56. s. 20. an appeal is given to the sessions against certain convictions, the party giving notice in writing to the justices convicting, and entering into a recognizance to try the appeal, &c; and those justices are required to give notice to the party of his right to appeal; if those justices do inform him of such right, without saying any thing about the notice, and he enter into the recognizance, the sessions are bound to receive the appeal, though he did not give the notice in writing. *R. v. The Justices of Leeds. E. 32 Geo. 3. 583*
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### ASSUMPSIT.

1. If a bankrupt on the eve of his bankruptcy fraudulently deliver goods to one of his creditors, the assignees may dis-affirm the contract, and recover the value of the goods in trover: but if they bring assumpsit, they affirm the contract, and then the creditor may set off his debt. *Smith v. Hodson. Hil. 31 Geo. 3. 211*
2. Assumpsit may be maintained to recover back money paid upon a compromise, after another action has been brought for it by the defendant against the plaintiff, and an interlocutory judgment had, and a writ of enquiry executed thereon; it appearing afterwards that there was no real consideration for the first payment, and it having been made ultimately under a compromise, and not under the compulsory judgment

of a court. *Cobden v. Kendrick, Mich. 32 Geo. 3. Page 432*

3. If a revenue officer seize goods as forfeited, which are not liable to seizure, and take money of the owner to release them, the latter may recover back the money in an action for money had and received; in which action the month's notice under 23 Geo. 3. c. 70. s. 30. need not be given. *Irving v. Wilson. Mich. 32 Geo. 3. 485*
  4. Assumpsit for money had and received does not lie against an excise officer to recover duties received by him after the act imposing them is repealed, if he have paid them over to his superior; and in such case he is entitled to a month's notice before the action is brought by 23 Geo. 3. c. 70. s. 30. *Greenaway v. Hurd. Hil. 32 Geo. 3. 553*
  5. The testator having borrowed money on a *respondentia* contract prohibited by law, his executors, the plaintiffs, refunded the money to the lenders, the defendants; held that the executors could not maintain an action for money had and received to recover back this money, notwithstanding the defendants could not have compelled them to pay it. *Munt v. Stokes. Hil. 32 Geo. 3. 561*
  6. Goods distrained by the plaintiff were delivered by him to the defendant on his promising to pay the rent; held that an action for money had and received would not lie for the value of the goods, though the defendant did not pay the rent. *Leery v. Goodson. E. 32 Geo. 3. 687*
- See BANKRUPT, No. 6.

### ATTACHMENT.

See BANKRUPT, No. 2, 3. FOREIGN ATTACHMENT.

### ATTORNEY

1. Though the court will not interfere on behalf of an attorney, and prevent the plaintiff's settling his own cause without first paying the attorney's bill, yet when the adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the court will take care that the attorney's bill is satisfied. *Mitchell v. Oldfield. Hil. 31 Geo. 3. 123*
2. Therefore where A. recovered against C. and C. recovered against A. and B., the court would not permit C. to set off the damages



## INDEX TO THE PRINCIPAL MATTERS.

images which he had recovered against those obtained by *A.* unless *C.* would undertake that the bill of *A.*'s attorney in the first action should be satisfied; he having a lien on the judgment for his costs.

Page 123

3. The Court will refer an attorney's bill to be taxed, though *all* the business be done at the quarter sessions. *Ex parte Williams, Mich. 32 Geo. 3.* 496

4. When an attorney sues by attachment of privilege, his name need not be indorsed on the writ; for the 2 *Geo. 2. c. 23. s. 22.*, which requires the name of the plaintiff's attorney to be indorsed on the writ, only extends to cases where the attorney sues for another person. *Fields One, &c. v. Lewen, E. 31 Geo. 3.* 275

5. In an action by an attorney for words spoken of him in his profession, he need not prove that he is an attorney by his admission, or by a copy of the roll of attorneys; proof that he acted as such is sufficient. *Berryman, One, &c. v. Wise. Trin. 31 Geo. 3.* 366

6. No attorney employed as a writer or clerk by any other attorney shall, during such employment, take or have any clerk under articles; and no service to such attorney shall be deemed good. No person articulated to an attorney shall serve the agent of such attorney under such articles longer than one year of his clerkship; and such service beyond that time shall not be good. Any person applying to be admitted an attorney of *B. R.* who has not been admitted an attorney or solicitor of any other court, shall for one full term, previous to application to be admitted, cause his name and place of abode, and the name and place of abode of the attorney to whom he was articulated, to be affixed, in legible characters, on the outside of the court of *B. R.* where public notices are usually affixed, and in a conspicuous place in the chambers of each of the judges of the court, and in the King's Bench office; otherwise he cannot be admitted an attorney. *Reg. Gen. Trin. 31 Geo. 3.* 379

7. This rule extends to services performed before as well as after *Michaelmas* term. *Mich. 32 Geo. 3.* 492

See WITNESS, No. 2, 3, 4, 5.

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### ATTORNEY, *Warrant of,*

See PRISONER.

### AVOWRY,

See RENT.

### A W A R D.

1. An award made upon a reference of *all matters in difference* between the parties does not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject matter of such action was not laid before the arbitrators, nor included in the matters referred. *Ravee v. Farmer, Hil. 31 Geo. 3.* Page 146
2. The Court will not set aside the award of an umpire, because he received the evidence from the arbitrators, without examining the witnesses, unless he were requested to re-examine them before the making of his award. *Hall v. Lawrence, E. 32 Geo. 3.* 589

B.

### B A I L.

1. A defendant may be held to special bail in an action on a judgment for 10*l.* for damages and costs; tho' the original debt alone were under 10*l.* *Lewis v. Pottle, Hil. 32 Geo. 3.* 570
- See AFFIDAVIT, No. 1, 2. PRACTICE, No. 3, 4, 5. 10. 15. 24, 25. 35. 40. SHERIFF, No. 2, 3.

### B A N K R U P T.

1. The bankruptcy of the lessee is no bar to an action of covenant (made before his bankruptcy) brought against him for rent, since the bankruptcy. *Auriol v. Mills, in error. Mich. 31 Geo. 3.* 94
2. If, after the assignment of a bankrupt's estate, a creditor residing in *England*, attach the money of the bankrupt abroad, the assignees may recover it in an action for money received to their use. *Hunter v. Patts, Hil. 31 Geo. 3.* 182
3. By the assignment under the commission, all the bankrupt's property, whether abroad or at home, passes. *ib.*
4. If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may disaffirm the

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c



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contract, and recover the value of the goods *in trover*; but if they bring *assumpsit*, they affirm the contract, and then the creditor may set off his debt. *Smith v. Hodson*, *Hil. 31 Geo. 3.* Page 211

5. Where the defendant lent his acceptance to the bankrupt on a bill, which did not become due till after the act of bankruptcy, and was then out-standing in the hands of third persons, yet the defendant having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to set off the same, under the words "mutual credit" in the 5 *Geo. 2. c. 30. s. 28.*

6. If *A.* lend stock to *B.* to be re-placed as stock, without naming any particular day, and *B.* become a bankrupt before any request by *A.* to re-place the stock, *A.* cannot come in under *B.*'s commission; because it rested merely in damages. *Utter-son v. Vernon*, *Hil. 32 Geo. 3.* 570

See AFFIDAVIT, No. 1. BILLS OF EXCHANGE, No. 11. PLEADING, No. 3.

### BARON AND FEME.

1. A husband is not bound to maintain his wife's child by a former husband. *Tubb v. Harrison*, *Mich. 31 Geo. 3.* 118
2. A feme covert cannot sue without her husband as a sole trader by the custom of London in the superior courts at Westminster. *Candell v. Shaw*, *Trin. 31 Geo. 3.* 361
3. Where a feme covert, sole trader, gave a bond and warrant of attorney to enter up judgment, on which the plaintiff afterwards took out execution, the court set the judgment aside, as entered up without authority, on the motion of the assignees of the wife [who had become a bankrupt] with the consent of the husband, which was also entered in the rule. *Read v. Jewison*, *Hil. 13 G. 3. B. R. cited ib.* 362
4. If a bond be given to husband and wife, administratrix, the husband alone may declare on it as on a bond made to himself. *Ankersfein v. Clarke*, *E. 32 Geo. 3.* 616

See WITNESSES, No. 7.

### BARRATRY.

See INSURANCE, No. 1, 2.

### BASTARDY.

1. Where an order of sessions stated that a child was born during the co-habitation of the pauper and his supposed wife, and was baptized as their child, this was held sufficient evidence of bastardy to settle the child where born, altho' the former and real husband of the mother was in England at the time. *R. v. The Inhabitants of Lubbenham*, *E. 31 Geo. 3.* Page 251
2. The child of a married woman may be proved a bastard by other evidence than that of the husband's non-access, as by evidence of being born during the notorious co-habitation of his mother with another man, and of his being considered by all the family as the child of those two. *Goodright d. Tompson v. Saul*, *Trin. 31 Geo. 3.* 356

### BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In an action by the indorsee against the acceptor of a bill, drawn payable "to *A.* or order," the defendant may shew that the person, who indorsed to the plaintiff, was not the real payee, though his name were the same, and though there were no addition to the name of the payee on the bill. *Mead v. Young*, *Mich. 31 Geo. 3.* 28
2. If a bill, payable to *A.* or order, get into the hands of another person of the same name as the payee, and such person, knowing that he is not the real person in whose favor it was drawn, indorse it, he is guilty of forgery. *ib.*
3. Three days grace are allowed on inland as well as on foreign bills of exchange, and on promissory notes; for the 3 & 4 *Ann. c. 9.* puts the latter on the same footing as inland bills of exchange in all respects. *Brown v. Harraden*, *Hil. 31 Geo. 3.* 151
4. The provisions of the 9 & 10 *W. 3. c. 17.* respecting protests of inland bills do not apply to such bills as are made payable after sight. *Liftley v. Mills*, *Hil. 31 Geo. 3.* 170
5. Therefore an acceptor of such a bill, who refuses payment on the third day of grace, is not liable to any charge for the noting of the bill. *ib.*
6. *Quare*, Whether the acceptor of an inland bill be bound to pay it on demand at any reasonable



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reasonable time of the third day of grace, or whether he be allowed the whole of that day to pay it in? For the court will not take notice of banking hours. *Page* 170

7. Noting is unknown to the law as distinguished from the protest, of which it is merely a preliminary step. *ib.*

8. Defendant having suffered judgment by default in an action on a bill of exchange, the Court referred it to the Master to see what was due for principal and interest, without executing a writ of inquiry. *Shepherd v. Charter, E. 31 Geo. 3. 275*

9. An alteration of the date of a bill of exchange after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it even by an innocent holder for a valuable consideration. *Master v. Miller, Trin. 31 Geo. 3. 320*

10. A. having declared on a promissory note against B. made by C. to A. by him indorsed to B. and by him again indorsed to A. judgment was arrested after verdict, on the ground of circuitry of action. *Bishop v. Hayward, Mich. 32 Geo. 3. 470*

11. If the payee of a promissory note pay the amount of it to an indorsee after the bankruptcy of the maker, he may recover against the maker, notwithstanding his bankruptcy and certificate. *Howis v. Wiggins, Trin. 32 G. 3. 714*

12. The holder of a bill sued the acceptor, and charged him in execution; the latter having obtained his discharge under the Lords' act, the holder then sued the drawer, who, after paying the bill, sued the acceptor, and charged him in execution, which was held to be regular; the defendant's having been charged in execution at the suit of the holder not being a satisfaction as between the drawer and acceptor. *Macdonald v. Bovington, Trin. 32 Geo. 3. 825*

See AGENT, No. 2, 3. MARRIAGE, No. 1, 2. PARTNERS. PRACTICE, No. 45.

### BILL OF SALE.

1. Notwithstanding the stat. 26 Geo. 3. c. 60. s. 17. enacts that a bill of sale of a ship shall be absolutely void, unless the certifi-

cate of the registry be truly and accurately inserted therein, a mere clerical mistake will not vitiate it. *Rolleston v. Smith, Hil. 31 Geo. 3. Page 161*

### BOND.

1. A bond given by an incumbent to the patron, on presentation, to reside on the living, or to resign if he did not return to it after notice, and also not to commit waste, &c. on the parsonage house, is good. *Bagshaw v. Bosley, Mich. 31 Geo. 3. 78*
2. In such a case a license to the incumbent to absent himself from the living may be revoked. *ib.*

See SHERIFF, No. 2, 3.

### BOOKS, ENTRIES, PAPERS, &c.

See EVIDENCE, No. 1, 2, 3.

### BOROUGH COURT.

See MANOR, No. 3.

### BUSHEL.

See MEASURE. VARIANCE, No. 6.

### C.

### CARRIER.

1. A common carrier between A. and B. employed to carry goods from A. to B. to be forwarded to C. carried them to B., then put them in his warehouse, in which they were destroyed by an accidental fire, before he had an opportunity of forwarding them; and held not answerable for the loss. *Garfide v. The Proprietors of the Trent Navigation. E. 32 Geo. 3. 581*

### CARTS.

1. The owner of a cart who does not reside within the bills of mortality, or within five miles of *Temple Bar*, need not enter his name and place of abode with the commissioners of hackney coaches, or have his name or any number upon the cart, tho' it be driven within those limits. *R. v. Powell, Hil. 32 Geo. 3. 572*



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### CASES DOUBTED OR DENIED.

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| Cowp. 128.                   | Anonymous.                                                                                                                                                   | ib.      |
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| Palmer v. Needham.           | 3 Burr. 1389.                                                                                                                                                | ib.      |
| Utterton v. Vernon.          | 3 Term Rep. 539.                                                                                                                                             | ib.      |
| Hoyl v. London.              | 3 Keb. 839.—631.                                                                                                                                             | 646. 649 |
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| Blackwell v. Nash.           | 1 Str. 535.                                                                                                                                                  | ib.      |

### CERTIFICATE.

See SETTLEMENT BY CERTIFICATE.

### CERTIORARI.

1. If an appeal against a poor-rate be dismissed by the sessions for not having been made in time, and it be removed by *certiorari* into B. R. the court will not go into any objection appearing upon the face of it. R. v. Atkins. Mich. 31 Geo. 3. 12
2. A *certiorari* to remove an indictment of an excise-officer from the sessions was granted on the motion of the Attorney General, without any affidavit. R. v. Stanward. Hil. 31 Geo. 3. 161
3. The party prosecuting a *certiorari* to remove a conviction, &c. must himself enter into a recognizance with two other persons to prosecute it with effect, &c. by 5 G. 2. c. 19. s. 2. R. v. Boughey. E. 31 Geo. 3. 281
4. A *certiorari* to remove a conviction must by 13 Geo. 2. c. 18. s. 5. be applied for within six months after the date of such conviction. ib.

5. Third persons cannot object to the misdirection of a *certiorari* to remove a cause from an inferior court, if the proper officers in whose keeping the record was wave the objection, and return the record upon such writ. Daniel v. Phillips. Hil. 32 G. 3. Page 499
6. Neither will the court here quash such writ because the damages laid in the record below, which was an action of assault against excise officers, were under 40 s. there being reason to believe that they could not have an impartial trial below. ib.

### CHARITABLE USE.

See DEVISE. No. 5.

### CHARTER.

See JURISDICTION, No. 5, 6. PLEADING, No. 23. 29. USAGE.

### CHOSE IN ACTION.

1. An assignment of a chose in action need not be by deed. Howell v. Mac Ivers. E. 32 Geo. 3. 690
2. Comments on choses in action per Buller, J. 340

### CHURCHWARDEN.

See QUO WARRANTO INFORMATION, No. 6.

### CIRCUITY OF ACTION.

See ACTION, No. 1.

### CLERGY.

See CONVICTION, No. 2.

### COLLEGE.

See QUO WARRANTO INFORMATION, No. 2. VISITOR.

### COMMITMENT.

See CORRECTION, No. 1. HACKNEY COACHMEN.

### COMMON.

1. One commoner, who has surcharged, may nevertheless maintain an action against another for surcharging the common. Hobson v. Todd. Mich. 31 Geo. 3. 74
- See PLEADING, No. 4.



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## CONTEMPT.

See FEIGNED ISSUE, No. 2.

## CONVICTION.

1. A commitment on the 17 Geo. 2. c. 5. (the vagrant act) must be a commitment in execution, and is therefore bad if it merely state the charge and order the party to be committed for safe custody till the sessions without convicting the offender of the charge. *R. v. Rhodes. E. 31 Geo. 3. Page 220*
  2. Outlawry is a conviction within the meaning of 14 Geo. 2. c. 6. s. 1. against sheep stealing. *R. v. Yandell. Hil. 32 Geo. 3. 521*
  3. If a conviction under the 31 Geo. 3. c. 21. s. 4. which enacts that all convictions against that act may be made out "in the form, or to the effect, following" (giving the form) contain all the substantial parts of that prescribed, it is good, though it also contain something more. *R. v. J. Jefferies. Trin. 32 Geo. 3. 767*
  4. Surplusage will not vitiate a conviction. *ib.*
  5. Two persons cannot be convicted in separate penalties under the 5 Ann. c. 14. s. 4. for using a greyhound to destroy game. *R. v. P. Bleasdale. Trin. 32 Geo. 3. 809*
- See CARTS. CERTIORARI, No. 3, 4.

## COPYHOLD.

See MANOR.

## CORONER.

See OUTLAWRY, No. 7.

## CORPORATION.

1. Where a charter required that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, should elect corporate officers, and directed that the common council should consist of 36, it was held that a majority of the whole number must meet to form an elective assembly; and that, if the corporation be reduced to a smaller number than a majority of the whole, no election of officers can be had. *R. v. Bellringer. Trin. 32 Geo. 3. 810*
2. But where a corporation consists of an indefinite number, a major part of the exist-

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ing body are competent to elect, and do other corporate acts. *Page 822*

See QUO WARRANTO INFORMATION.

## COSTS.

1. If defendant pay money into court, and the plaintiff afterwards proceed to trial, when a verdict is given against him, the latter is not entitled to the costs up to the time when the money was paid into court. *Stevenson v. Yorke, and Kabell v. Hudson. Mich. 31 Geo. 3. 10*
  2. When the defendant pays money into court, which the plaintiff agrees to accept, the latter must serve the defendant with notice of an appointment before the master to tax the costs. *Kabell v. Hudson. Mich. 31 Geo. 3. 10*
  3. If a sessions case be sent down to be re-stated, and the prosecutor abandon it when it is returned, this court will discharge his recognizance for the costs, but if he dispute the amended order, they will not. *R. v. Inhabitants of Edgeworth. Hil. 31 Geo. 3. 218*
  4. If an executor declare on a trover and conversion in the testator's life-time, and also on a trover and conversion after his death, the evidence offered being only applicable to the first count, and he be non-suited, he is not liable to pay costs. *Cockerill et Ux. Executrix v. Kynaston. E. 31 Geo. 3. 277*
  5. But if a plaintiff name himself executor when he need not, and fail, he shall pay costs; as where his declaration states a cause of action due to him personally. *ib.*
  6. On a feigned issue costs follow the verdict: But *qu.* when the court permit parties to try a feigned issue, whether they will not compel them to consent that the costs shall be in the discretion of the court? *Hoskins v. Lord Berkeley. Mich. 32 Geo. 3. 402*
  7. If a defendant pay money into court upon some of the counts only, and the plaintiff take it out, the latter is only entitled to the costs of those counts. *Baillie v. Cazalet. Hil. 32 Geo. 3. 579*
  8. A defendant in execution for the contempt, and for the costs, on a *quo warranto* information, may be discharged under the Lords' act. *R. v. Pickerill. Trin. 32 Geo. 3. 809*
- See ATTORNEY, No. 1, 2. EXECUTOR. PRACTICE, No. 18. 47. REPLEVIN, No. 2.

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# INDEX TO THE PRINCIPAL MATTERS.

## COUNSEL.

See WITNESS, No. 3, 4, 5.

## COUNTY STOCK.

1. If a fine be imposed on a county, which the justices at the sessions think illegal, they may order the treasurer to defray the expence of litigating the question out of the county stock. *R. v. Inhabitants of Essex.* *E. 32 Geo. 3.* Page 591
2. So they may the expence of litigating any question respecting the repairs of the highways or county bridges, or the purchase of land adjoining to such bridges. 594, 595, 596

## COUNTY.

See DIVISION. JURISDICTION, No. 5, 6.

## COURT-BARON.

See MANOR, No. 2.

## COVENANT.

1. In covenant (which runs with the land) evidence that the defendant is in as *heir* will support a declaration charging him as *assignee*. *Derisley v. Cusstance.* *Mich. 31 G. 3.* 75
  2. The bankruptcy of the lessee is no bar to an action of covenant (made before the bankruptcy) brought against him for rent due since. *Auriol v. Mills* in error. *Mich. 31 Geo. 3.* 94
  3. Neither is a seizure and sale of the lease under a writ of *feri facias*, or *elegit*, against the lessee. 99
  4. Nor a forfeiture by his attainder. *ib.*
  5. *A.* agreed to sell *B.* his estate for a certain sum before a particular day, in consideration whereof *B.* agreed to pay that sum on the day, and on failure to pay 21 *l.*; it was held that they were dependant covenants; and that *A.* could not recover the 21 *l.* without shewing a conveyance on his part, or a tender of one. *Goodisson v. Nunn.* *Trin. 32 Geo. 3.* 761
- See PLEADING, No. 25, 26.

## CRIMINAL CONVERSATION.

See NEW TRIAL, No. 2.

## CUSTOM.

1. A custom to take a profit in *alieno solo* is bad; such a right can only be claimed by prescription. *Grimstead v. Marlowe.* *Trin.*

32 *Geo. 3.* 717. and *Hardy v. Holiday.* *E. 5 Geo. 3.* *C. B.* cited in Page 718

See EVIDENCE, No. 5. PLEADING, No. 16, 17. 23. 29.

## CUSTOMARY ESTATE.

See MANOR, No. 1.

## CUSTOM OF LONDON.

See LONDON.

## D.

## DAMAGES.

See CERTIORARI, No. 6. REPLEVIN, No. 2.

## DEED.

1. If *A.* execute a deed for himself and his partner, by the authority of his partner and in his presence, it is a good execution, though only sealed once. *Ball v. Dunster-ville* and another. *Trin. 31 Geo. 3.* 813
- See CHOSE IN ACTION. PRESUMPTION.

## DE ESSENDO QUIETUM DE THEOLONIO.

See TOLL, No. 4.

## DEMISE.

1. A parol agreement to lease lands for four years only creates a tenancy at will: but if that tenancy be not determined before the day of the demise laid in the declaration, the plaintiff in ejectment cannot recover. *Goodtitle d. Gallaway v. Herbert.* *E. 32 Geo. 3.* 680

## DEPARTURE.

See PLEADING, No. 16. 19. 22.

## DEPUTY.

See OFFICER, No. 2.

## DETINUE.

See SPECIAL OCCUPANT.

## DEVIATION.

See INSURANCE, No. 2.



# INDEX TO THE PRINCIPAL MATTERS.

## DEVISE.

1. *A.* devised to his son *B.* for life, remainder to trustees during *B.*'s life to preserve contingent remainders, nevertheless to permit *B.* to receive the rents and profits, remainder to the first and other sons of *B.* in tail-male, remainder to *C.*; with a proviso that if *B.* should succeed to the estate of *D.* the limitation of *A.*'s estate to *B.* should cease, and the next in remainder should take as if *B.* were dead; *B.* succeeded to *D.*'s estate before he had a son; held that the limitation to the trustees continued during the whole of *B.*'s life so as to support the contingent remainders. *Doe d. Heneage v. Heneage. Mich. 31 Geo. 3. Page 13*
2. Under a devise "to *A.* for life, and after his decease to and amongst his issue, and in default of issue" then over, *A.* takes an estate-tail. *Doe d. Blandford v. Applin. Mich. 31 Geo. 3. 82*
3. In order to give effect to the deviser's general intent, the court will overlook a particular intent inconsistent therewith. *ib.*
4. *A.* devised his real and personal estates to his wife for life, and directed part of the personalty to be sold after his wife's death by the executor, and divided between *C. D. E. F. and G.*; he then gave two annuities to *H. & J.* to be paid by his executor out of his whole estate, and to commence after his wife's death; and he then devised the remainder of the profits after his wife's death and after the yearly payments to the annuitants out of his whole estate to *B. C. and D.* equally, share and share alike; held that the executor took a fee. *Doe d. Beezley v. Woodhouse, Mich. 31 Geo. 3. 89*
5. *A.* devised to *B.* preacher of the meeting-house of *C.* for life, on condition that he should convey the premises to trustees, to take place after *B.*'s death, for the use and support of the preaching the word of God at the meeting-house for ever, and in case the preaching there should be discontinued, then over to a charity-school; held that *B.* took an estate for life, though the devise

- over after his death would be void by *stat. 9 Geo. 2. c. 36. Doe v. Aldridge, E. 31 Geo. 3. Page 264*
6. Issue is either a word of purchase or limitation, as will best effectuate the deviser's intention. *Doe v. Collis, Trin. 31 Geo. 3. 294*
  7. Therefore where *A.* devised his estate to his two daughters, to be equally divided between them, one moiety to one and her heirs, and the other moiety to the other for life, and after her decease, to the issue of her body, and their heirs for ever, and she had one child living at the time of the devise, the second took only an estate for life, with remainder to her children as purchasers. *ib.*
  8. Under a devise to *A.* and his heirs, but if he die without settling or disposing of the same, or without issue, then over, *A.* may settle the estate in his life-time, and defeat the limitation over. *Beachcroft v. Broome, Mich. 32 Geo. 3. 441*
  9. *A.* devised "to *B.* and the heirs of her body, and for default of such issue," then over; *B.* died in the life-time of *A.*, and then *A.* by a codicil confirmed his will; held that the heir of *B.* took nothing, though it appeared that *A.* knew of the death of *B.* and of the birth of her son before he made the codicil. *Doe d. Turner v. Kett, E. 32 Geo. 3. 601*
  10. The codicil operated as a republication of the will; and then it stood thus; "a devise to *B.* and the heirs of her body;" but *B.* being dead, the devise was void. *ib.*
  11. Under a devise "to *A.* and *B.* and their heirs, and in case they agreed to sell the estate that they should have their equal shares of the money arising therefrom, but if they agreed to keep the estate whole together, then that the rents should be equally paid and divided between them, and to the several and respective heirs of their bodies," *A.* and *B.* took only estates tail. *Roe d. James v. Avis, E. 32 Geo. 3. 605*
  12. *A.* being seised in fee tail of an undivided fourth part of an estate, and intitled to the reversion in fee of another fourth expectant on the determination of an estate tail, recited



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- recited that she was intitled to the first, and devised it to *B. C.* in fee; and then directed all the residue and remainder of her estate and effects to be sold as soon as might be after her death, and her funeral expences to be paid thereout, and the overplus (if any) to be divided between *D.* and *E.*; it was held that the reversion did not pass by these general words. *Page 605*
13. *A.* bequeathed money to trustees in trust for *B.* till she should attain 21, and then to pay the same to her, and if *B.* should die under 21, leaving a child or children, then in trust for such child or children; but if *B.* should die under 21, without leaving any child or children, then in trust for *C.*'s three nieces; *B.* attained 21, married, had two children, and died in the life-time of the testatrix; *B.*'s children took nothing by the will. *Doo v. Brabant, Trin. 32 Geo. 3. 706*
14. *A.* devised "to all and every the daughter and daughters of the body of *B.*, and the heirs male of the body of such daughter or daughters equally between them, if more than one, as tenants in common, and for default of such issue (he devised) all his said lands to *C.*;" held that the daughters of *B.* took cross remainders. *Atherton v. Pye, Trin. 32 Geo. 3. 710*
15. The rule is, that, as between two only, it shall be presumed that cross remainders were intended to be raised; but, if there be more than two, it is necessary to resort to other words in the will to discover an intention to raise them. *713*
16. *A.* devised to *B.* his wife for life, and empowered her to devise the same to any one or more of his child or children in such manner, share, and proportion as she should appoint, "but so as the said estate should not be divided, but transmitted whole and entire to his heirs;" and in another part (after devising an adjoining estate in the same way,) he added that his will was that "they should be considered as one estate, and be transmitted entire to his family," and in default of appointment to his own right heirs; *B.* by will devised and appointed to their son *C.* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *C.* in tail general; remainder

to the daughters of *C.* in tail general; and with like limitations to *D.* and *E.* two other children; all the children *C. D.* and *E.* were alive when *A.* devised; *Quare*, what estates did they severally take? *Per Lord Kenyon, Ch. J. and Grose, J.* they respectively took estates in tail general; *per Ashurst and Buller, Justices*, they respectively took life estates, with remainders in tail to their respective children. *Griffith v. Harvison, Trin. 32 Geo. 3. Page 737*

See LIMITATIONS.

### DISCHARGE.

See INSANITY. INSOLVENT, No. 2, 3.

### DISTRESS.

1. Implements of trade may be distrained for rent if they be not in actual use at the time, and if there be no other sufficient distress on the premises. *Gorton v. Falkner, Hil. 32 Geo. 3. 565*
2. So may beasts of the plough under the same circumstances. *ib.*
3. But things affixed to the freehold, such as an anvil or mill-stone, cannot be distrained. *ib.*
4. Things delivered to persons exercising their trade, such as cloth in a taylor's shop, are not distrainable. *Simson v. Harcourt, Mich. 18 Geo. 2. 569*

### DIVISION.

1. The moiety of a penalty being given by 22 Geo. 3. c. 41. to the treasurer of a county, riding, or division; held that the word *division* does not apply to small districts, such as the Cinque Port of *Seaford*, in *Sussex*; but must be construed with reference to county and riding, and means something analogous to them. *Evans 2. T. v. Stevens, E. 31 Geo. 3. 224*
2. Neither can it be applied to the different parts of a county in which the magistrates act under one general commission, but for the convenience of the county adjourn the quarter-sessions from one part of it to another, and appoint a separate treasurer for each. *Evans 2. T. v. Stevens, Mich. 32 Geo. 3. 459*
3. It



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3. It is only applicable to the legal divisions in *Lincolnshire*, where there are separate commissions of the peace, and separate sessions in the different divisions of the county. Page 462

### DUTIES.

See ASSUMPSIT, No. 3, 4.

### E.

#### EAST INDIA DELINQUENTS.

See AMENDMENT, No. 2.

### EJECTMENT.

1. Rule of court. *Mich.* 31 *Geo.* 3. 1
2. The Court will permit a devisee, not having been in possession, to defend in ejectment, as landlord, under 11 *Geo.* 2. c. 19. f. 13. *Lovelock d. Norris v. Dancoffer*, *Mich.* 31 *Geo.* 3. 122
3. A parol agreement to lease lands for four years only creates a tenancy at will; and if that tenancy be not determined before the day of the demise laid in the declaration, the plaintiff cannot recover. *Goodtitle d. Galloway v. Herbert*, *E.* 32 *Geo.* 3. 680
4. In ejectment by a landlord against a tenant, whose lease is expired, the latter is not barred from shewing that his landlord's title is expired. *England d. Syburn v. Slade*. *E.* 32 *Geo.* 3. 682

See NOTICE TO QUIT. PRACTICE, No. 1. 28

### ELECTION.

See CORPORATION. MANDAMUS, No. 1, 2, 3, 4. MANOR, No. 3. QUO WARRANTO INFORMATION, No. 1, 2, 6, 7.

### EMANCIPATION.

See SETTLEMENT. CERTIFICATE, No.

1. 4.

### ENTRIES.

See EVIDENCE, No. 1, 2, 3.

### ERASURE.

See BILLS OF EXCHANGE, No. 9.

### ERROR.

See PRACTICE, No. 18, 19, 20, 21.

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### ESCAPE.

1. In an action against the sheriff for the escape of a prisoner on mesne process, the plaintiff was nonsuited, because he could not prove any debt against the prisoner who escaped. *Alexander v. Macauley*, *E.* 32 *Geo.* 3. Page 611

### ESTATE.

See SETTLEMENT BY ESTATE. SPECIAL OCCUPANT.

### EVIDENCE.

1. Where the right to the soil is in issue, entries written in a book by the steward of a former owner, from whom title is derived, of receipts of money by the steward for that owner, as a satisfaction for trespasses committed on the place in question, are admissible evidence if the steward be dead. *Barry v. Bebbington*, *Hil.* 32 *Geo.* 3. 514
  2. So an entry, of the receipt of money by officers of a township from the officers of another township of a proportion of church-rates made in a parish book, is evidence to charge the latter officers with the same proportion in future. *Stead v. Heaton*. *E.* 32 *Geo.* 3. 669
  3. And another entry, explaining the proportions, made on the same page, is also admissible evidence. *ib.*
  4. An allegation in an action for a false return to a *mandamus* of a custom of payment by the chapel-wardens of *A.* to the churchwardens of *B.* may be supported by evidence of a custom of payment to officers acting only for the township of *B.*, not co-extensive with the parish of *B.*, but who have always been described as the churchwardens of *B.* *ib.*
  5. Contemporaneous usage may be given in evidence in order to construe a charter. *R. v. Bellringer*. *Trin.* 32 *Geo.* 3. 821
- See AFFIDAVIT, No. 4. 6. ATTORNEY, No. 5. AWARD, No. 12. BASTARDY. BILLS OF EXCHANGE, No. 1. COVENANT, No. 1. ESCAPE. HAND-WRITING. JURISDICTION, No. 4. LIBEL, No. 2. NOTICE TO QUIT. PARTNERS. PLEADING, No. 14. PROBATE. SETTLEMENT BY CERTIFICATE, No. 2. SLANDER. TOLL, No. 1. VARIANCE. WITNESS.



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### EXCISE.

See CERTIORARI. REVENUE OFFICERS.

### EXECUTION.

See EXTENT.

### EXECUTOR AND ADMINISTRATOR.

1. A plaintiff cannot join in the same declaration a cause of action, as executor, with another which accrued in his own right. *Cockerill v. Kynaston. E. 31 Geo. 3. Page 280*
2. Where the goods of the testator never were in the possession of the executor, he must declare in that character *ib.*
3. And whether the conversion happen before or after the testator's death, if the goods when recovered will be assets in the hands of the executor, he may sue for them in that character. *ib.*
4. A count on a promise made by defendant as administrator to pay money received by him as such to the plaintiff's use cannot be joined with other counts on promises made by the intestate. *Jennings v. Newman. Trin. 31 Geo. 3. 347*
5. Where executors pay a sum of money on the testator's account, which they need not have done, and afterwards bring an action to recover it back again, they must declare in their own right, and not as executors. *Munt v. Stokes. Hil. 32 Geo. 3. 565*
6. Goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right. *Farr v. Newman. E. 32 Geo. 3. 621*

See BARON AND FEME. COSTS, No. 4, 5.

### EXEMPTION.

See RATES, No. 1, 2.

### EXTENT.

1. If goods be taken in execution on a *fi. fa.* against the king's debtor, and before they are sold an extent come at the king's suit, grounded on a bond debt, teste'd after the delivery of the *fi. fa.* to the sheriff, these goods cannot be taken upon the extent. *Rorke v. Dayrell. Mich. 32 Geo. 3. 402*

2. The 33 H. 8. c. 39. s. 74. does not extend, but abridge, the king's prerogative. *Page 413 &c.*

### F.

### FAMILY.

See SETTLEMENT BY CERTIFICATE, No. 4, 5.

### FEIGNED ISSUE.

1. On a feigned issue costs follow the verdict: But *qu.* when the court permit parties to try a feigned issue, whether they will not compel them to consent that the costs shall be in the discretion of the court? *Hofkins v. Lord Berkeley. Mich. 32 Geo. 3. 402*
2. Trying a feigned issue without the consent of the court is a contempt of the court; and after such a trial they will stay the proceedings. *ib.*

### FEME.

1. A feme covert, living in adultery, and separate from her husband, cannot be sued as a feme sole, if she have no separate maintenance. *Gilchrist v. Brown. Trin. 32 Geo. 3. 766*

See BARON AND FEME.

### FENCES.

1. An action on the case for not repairing fences, whereby another party is damnified, can only be maintained against the occupier, and not against the owner of the fee who is not in possession. *Cheetham v. Hampson. Trin. 31 Geo. 3. 318*

### FERRY.

1. An exclusive right to a ferry from *A.* to *B.* does not prevent persons going by any other boat from *A.* directly to *C.* though it lie near to *B.*, provided it be not done fraudulently, and as a pretence for avoiding the regular ferry. *Tripp v. Frank. E. 32 Geo. 3. 666*

### FINE.

1. When once the five years allowed to an infant to make an entry for the purpose of avoiding



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avoiding a fine begin, the time continues to run notwithstanding any subsequent disability. *Doe d. Count Duroure v. Jones. Trin. 31 Geo. 3. Page 300*  
 2. Neither will subsequent insanity stop the running of a fine once commenced. *Doe d. Griggs v. Shane. Mich. 28 Geo. 3. B. R. 306. n.*

### FISHERY.

1. There may be a prescriptive right in a subject to a several fishery in an arm of the sea. *Mayor, &c, of Orford v. Richardson. Mich. 32 Geo. 3. 439*  
 See PLEADING, No. 18.

### FOREIGN ATTACHMENT.

1. A sum of money directed to be paid by A. to B. by the master's allocatur cannot be attached in A.'s hands by process out of the sheriff's court in an action against B. *Coppell v. Smith. Trin. 31 Geo. 3. 312*  
 2. Neither can money awarded under a rule of court be attached. *Grant v. Harding. Hil. 7 Geo. 3. B. R. 313. n.*

### FOREIGN JUDGMENT.

See INQUIRY WRIT OF, No. 2.

### FOREIGN LAWS.

See BANKRUPT, No. 2, 3.

### FOREIGN PARTS.

See TRESPASS, No. 2.

### FORGERY.

1. If a bill of exchange, payable to A. or order, get into the hands of another person of the same name as the payee, and such person, knowing that he is not the real person in whose favor it was drawn, indorse it, he is guilty of forgery. *Mead v. Young. Mich. 31 Geo. 3. 28*

### FRAUD.

1. Fraud will vitiate any transaction, though the principal person interested do not personally take any part in the fraud; for the principal is civilly responsible for the acts

of his agent. *Doe d. Willis v. Martin. Mich. 31 Geo. 3. Page 39*

See AGREEMENT. FERRY. INSOLVENT, No. 1.

### FURNITURE.

See POOR RATE, No. 13.

## G.

### GAME LAWS.

1. QUESTIONS respecting the boundaries of a manor cannot be tried in an action on the game laws. *Calcraft v. Gibbs. E. 32 Geo. 3. 681; and Hankins v. Bailey; and Blunt v. Grimes, there cited.*  
 2. But it is no defence to such an action that the defendant has a deputation from a person claiming to be lord of the manor, if there appear to be no ground for the claim. *Calcraft v. Gibbs. 681*

See CONVICTION, No. 3, 4, 5.

### GAOLER.

See SHERIFF, No. 5.

### GRAND CHILDREN.

See SETTLEMENT BY CERTIFICATE, No. 4.

### GREAT SEAL.

See OUTLAWRY, No. 9.

## H.

### HACKNEY COACHMEN.

1. UNDER statute 10 Geo. 3. c. 44. s. 7. a justice of the peace, after convicting a hackney coachman for refusing to go with his coach, may immediately commit him to the house of correction if he do not pay the penalty. *Duck v. Addington. Mich. 32 Geo. 3. 447*

### HALF PAY.

See OFFICER, No. 1.

### HAND-WRITING.

1. A clerk of the post-office accustomed to inspect franks for the detection of forgeries may



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may be examined as a witness to prove that the hand-writing of an instrument is an imitated, and not a natural, hand, though he never saw the supposed person write, and also to prove that two writings, suspected to be imitated hands, were written by the same person. *Goodtitle d. Revett v. Braham.* Trial at bar. *Hil. 32 Geo. 3. Page 497*

### HAWKER.

1. No hawker can expose goods to sale in any part of a market town, but the public market place, by 29 *Geo. 3. c. 26. s. 16, 17.* *R. v. Redfearne. E. 31 Geo. 3. 273*

### HEIR.

See ALIEN. PLEADING. No. 1. SPECIAL OCCUPANT.

### HOMAGE.

See MANOR, No. 3.

### HORSE-RACES.

1. The *stat. 13 Geo. 2. c. 19. s. 2.* having prohibited horse-races for a smaller stake than 50 *l.* no action to recover a wager on such a race can be supported. *Johnson v. Bann. Mich. 31 Geo. 3. 41*

### HUSBAND AND WIFE.

See BARON AND FEME.

### I.

### IMPARLANCE.

See PLEADING, No. 20.

### IMPRISONMENT.

See ARREST.

### INDICTMENT.

1. Where a new offence is created by an act, and a penalty annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may indict on the prior clause as for a misdemeanor. *R. v. Harris. Hil. 31 Geo. 3. 202*
2. Where two sets of magistrates have a concurrent jurisdiction, and one appoints a

meeting to grant ale licences, their jurisdiction attaches, so as to exclude the other appointing a subsequent meeting; though they may all meet together the first day. And if after such appointment the other set of magistrates meet on a subsequent day, and grant other licences, their proceeding is illegal and the subject of an indictment. *R. v. Sainbury. Mich. 32 Geo. 3. Page 451*

3. Where a statute forbids the doing of a thing, the doing it wilfully is indictable, although without any corrupt motive. *ib. 457*
  4. It is not an indictable offence to exercise a trade in a borough, contrary to the bye-laws of that borough. *R. v. J. Sharples. Trin. 32 Geo. 3. 777*
  5. An indictment that the defendant was appointed overseer of the poor of the parish of A., "and that he afterwards refused to take the said office of overseer of the parish, to which he was so appointed," was held good on demurrer. *R. v. J. Burder. Trin. 32 Geo. 3. 778*
- See LIBEL, No. 1. QUARANTINE, No. 1. SHERIFF, No. 2, 3. SLANDER.

### INFANT.

- See FINE. See *Stat. 7 Ann. c. 19. 49*
1. An infant cannot pray the parol to demur in any other stage of the proceeding than at the time of pleading. *Derisley v. Cuffance. Mich. 31 Geo. 3. 75*

### INFERIOR COURT.

See CERTIORARI, No. 5, 6.

### INFORMATION.

1. A criminal information having been granted against the defendant, he before the trial at *Nisi Prius* distributed hand bills in the affize town, vindicating his own conduct and reflecting on the prosecutor's. This matter, being disclosed to the judge at *Nisi Prius* by an affidavit, was held a sufficient ground to put off the trial; and that affidavit being returned to this court they granted another information on it against the defendant for such criminal conduct, considering the affidavit taken at *Nisi Prius* as taken under the authority of this court. *R. v. Jolliffe. Trin. 31 Geo. 3. 285*  
See



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See AMENDMENT, No. 2, 3. INSPECTION OF PAPERS. PRACTICE, No. 39. QUO WARRANTO INFORMATION.

### INQUIRY, WRIT OF.

1. Defendant having suffered judgment by default in an action on a bill of exchange, the court referred it to the Master to see what was due for principal and interest, without executing a writ of inquiry. *Shepherd v. Charter. E. 31 Geo. 3. Page 275*
2. But where the defendant suffered judgment by default in an action of assumpsit on a foreign judgment, the court would not refer it to the master to see what was due, and give the plaintiff leave to enter up final judgment for such sum, without executing a writ of inquiry. *Messin v. Lord Massacreene et Ux. Mich. 32 Geo. 3. 493*

### INQUISITION.

1. The court set aside an inquisition taken on a writ of inquiry because some of the jury were debtors in prison, and taken out of custody for the purpose of attending. *Stainton v. Beadle. Mich. 32 Geo. 3. 473*  
*Turner v. Clark. E. 31 Geo. 3. ib.*

### INSANITY.

1. The court will not discharge a defendant out of custody on filing common bail, on the ground that he was insane at the time of the arrest. *Nutt v. Verney. Mich. 31 Geo. 3. 121*

### INSOLVENT.

1. An insolvent assigned over his effects for the benefit of his creditors, and in the deed there was a proviso that the shares of those creditors, who did not execute it before a given day, should be paid to the insolvent; an agreement made between the insolvent and a creditor, that the latter should sign the deed, and the former pay the remainder of the whole debt, is fraudulent and void. *Jackson v. Lomas. Hil. 31 Geo. 3. 166*
  2. A prisoner who has lost the benefit of the Lords' act, 32 Geo. 2. c. 28. by the ignorance or mistake, or even misconduct, of an agent, may afterwards be discharged under 26 Geo. 3. c. 44. which provides relief for those who have neglected to take advantage of the former act through ignorance or mis-
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take. *Pearce v. Taylor. E. 31 Geo. 3. Page 231*

3. If a defendant be arrested on a *Capias*, and escape, and be afterwards re-taken, and committed to prison in the next term, he may apply in the following term to be discharged under the Lords' act; for the words in that statute, "*charged in execution*", mean being detained within the walls of the prison. *Vaughan v. Durnell. Trin. 31 Geo. 3. 367*
- See BILLS OF EXCHANGE, No. 12. COSTS, No. 8.

### INSPECTION OF PAPERS.

1. Where an information is filed by the attorney general against an officer of the *East India Company* on charges of delinquency in India, founded upon the report of a board of enquiry there, the defendant has no right to have an inspection of that report, nor has this court any discretionary power to grant it. *R. v. Holland. E. 32 Geo. 3. 691*

### INSURANCE.

1. In an action by the assured of goods against the underwriters for a loss by the barratry of the master, proof that the person described in the policy as *master*, and who was treated with and acted as such, carried the ship out of her course for fraudulent purposes of his own, is *prima facie* sufficient to entitle the plaintiff to recover, without shewing negatively that he was not the owner, or affirmatively that any other person was. *Ross v. Hunter. Mich. 31 Geo. 3. 33*
  2. And where the voyage insured was from Jamaica to New Orleans, which lies up the river *Mississippi*, and the captain proceeded on his voyage as far as the mouth of that river, and then dropped anchor, and went up the river in his boat for a fraudulent purpose of his own, it was held that the dropping of his anchor with such fraudulent intent was an act of barratry, and not merely a deviation. *ib.*
  3. Provisions sent out in a ship for the use of the crew are protected by a policy on the ship and furniture. *Brough v. Whitmore. Hil. 31 Geo. 3. 206*
  4. If an armed force board a ship, and take part of the cargo, the underwriters are not liable on a count stating the loss to be by a seizure by people to the plaintiffs unknown;
- 10 G for



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for "people" in the policy means "the governing power of the country." *Nesbitt v. Lufbington, Trin. 32 Geo. 3. Page 783*

5. Where, after such a seizure, the vessel was stranded, and part of the cargo (consisting of corn) taken by the mob at their own price, the loss cannot be recovered, as for a general average: but for such part as in consequence of the stranding was damaged and thrown overboard, the insured may recover on a count stating the loss to be by stranding. *ib.*

### JOINDER IN ACTION.

See PLEADING. No. 9, 10.

### ISSUE.

See DEVISE, No. 6, 7. FEIGNED ISSUE.

### JURISDICTION.

1. The stat. 1 Jac. 1. c. 22. gives certain penalties, to be recovered (by sect. 46.) by action of debt or information in the courts of *Westminster*; the 50th sect. gives jurisdiction to the justices of assize, of gaol delivery, and of the peace, to enquire of the premisses, and to hear or determine the same; under the latter clause the inferior courts can only proceed by indictment or presentment. *Shipman 2. T. v. Henbest, Mich. 31 Geo. 3. 109*
2. The informer may bring an action of debt upon this statute in the courts of *Westminster*, notwithstanding the 21 Jac. 1. c. 4. *ib.*
3. The stat. 21 Jac. 1. c. 4. only restrains the proceedings on penal statutes in the superior courts, where the informer, before the passing of that statute, might have sued in the inferior as well as the superior courts by action, bill, plaint, suit, or information. *ib.*
4. But though the 4th sect. of the 21 Jac. 1. c. 4. enables a defendant to plead the general issue, and give the special matter in evidence, yet he cannot avail himself under such plea of any matter which goes to the jurisdiction of the court. *ib.*
5. By charter the mayor and some of the aldermen of *London* have jurisdiction in *Southwark*, but as the charter contains no non-intromittant clause as to the justices of

the county of *Surry*, the latter have a concurrent jurisdiction with the former. *R.*

*v. Sainsbury, Mich. 32 Geo. 3. Page 451*

6. Where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant ale licences, their jurisdiction attaches, so as to exclude the others appointing a subsequent meeting; but they may all meet together on the first day. *ib.*
  7. But if after such appointment the other set of magistrates meet on a subsequent day, and grant other licences, their proceeding is illegal, and the subject of an indictment. *ib.*
  8. Where the acts of commissioners appointed by a paving act occasion a damage to an individual, without any excess of jurisdiction on their part, the commissioners or pavors acting under them are not liable to an action. *The Governor &c of the British Cast Plate Manufacturers v. Meredith, Trin. 32 Geo. 3. 794*
- See ANNUITY, No. 6. APPEAL, No. 7. COUNTY STOCK. ORDER OF REMOVAL, No. 3.

### JURY.

See INQUISITION.

### JUSTICES OF PEACE.

See HACKNEY COACHES. INDICTMENT, No. 2. JURISDICTION, No. 5, 6, 7.

### K.

### KING'S BENCH PRISON.

See OFFICER, No. 2.

### L.

### LAND-TAX.

1. HOUSES built on lands embanked from the *Thames* in pursuance of 7 Geo. 3. c. 37. are not liable to be assessed to the land-tax, though the land-tax act is subsequent in point of time to the former. *Williams v. Priehard, Mich. 31 Geo. 3. 2*
2. Nor to the rates made under 11 Geo. 3. c. 29. for draining, &c, the city of *London*. *Eddington v. Borman, Mich. 31 Geo. 3. 4*



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## LANDLORD.

See EJECTMENT, No. 2, 3, 4. NOTICE TO QUIT.

## LECTURER.

1. An immemorial custom for the inhabitants of a parish to elect a lecturer is binding on the rector. *R. v. Field, Hil. 31 Geo. 3.* Page 125
2. But where there is no such custom, and the lecturer has been paid out of the poor rates, the court will not grant a mandamus to the rector to certify to the bishop the election of a lecturer chosen by the inhabitants. *ib.*

## LIBEL.

See SLANDER.

1. An indictment for publishing libellous matter, reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, to stir up the hatred of the king's subjects against them, and to excite his relations to a breach of the peace, cannot be supported. *R. v. Topham, Hil. 31 Geo. 3.* 126
2. Proof that the defendant gave a bond to the stamp office for the duties on the advertisements in a newspaper under the *stat. 29 Geo. 3. c. 50. s. 10.*, and had occasionally applied at the stamp office respecting the duties, is evidence that he is the publisher. *ib.*

## LICENSE.

1. A license by the patron to the incumbent (who had given the former a bond to reside on the living, or to resign if he did not return after notice) to absent himself may be revoked. *Bagshaw v. Bosley, Mich. 31 Geo. 3.* 78

See ALE-LICENSES.

## LIEN.

See ATTORNEY, No. 1, 2,

## LIME-KILN.

See PLEADING, No. 19.

## LIMITATIONS.

1. By a marriage settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates, &c., as the husband and wife should appoint, and for want of such appointment to the use of all and every the child or children equally, if more than one, as tenants in common, and if but one, then to such only child, his or her heirs or assigns for ever; remainder over; in the deed was contained a power, enabling the settlers to revoke the uses of the settlement, and the trustees to sell the estate, and convey it to a purchaser, so as the purchase money should be paid to the trustees (and not the settlers) and invested in the purchase of other lands to the same uses; it was held that *the remainder to the children was a vested remainder in fee*, liable however to be divested by an appointment by the parents. *Doe d. Willis v. Martin, Mich. 31 Geo. 3.* Page 39
2. In such a case, where no appointment was made, the remainder to the children was not defeated by a deed of revocation by the parents, and a conveyance by them and the trustees to a purchaser, who paid the consideration money to the settlers (not to the trustees) which was never laid out in the purchase of any other lands. *ib.*
3. The above power of revocation was conditional; and as the conditions, *fs.* the payment of the money to the trustees, and the settling of other estates to the same uses, were not performed, the deed of revocation was a nullity. *ib.*

See DEVISE. SETTLEMENT BY ESTATE.

## LIMITATION OF TIME.

1. Though one plaintiff be abroad, if the others be in *England* the action must be brought within six years after the cause of action arises. *Perry v. Jackson, Hil. 32 Geo. 3.* 516.

See FINE. QUO WARRANTO INFORMATION. No. 5.



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### LONDON.

1. A feme covert cannot sue without her husband as a sole trader by the custom of London in the superior courts of Westminster. *Caudell v. Shaw*, Trin. 31 Geo. 3. Page 361
2. Where a feme covert, sole trader, gave a bond and warrant of attorney to enter up judgment, on which the plaintiff afterwards took out execution, the court set aside the judgment, as entered up without authority, on the motion of the assignees of the wife [who had become a bankrupt] with the consent of the husband, which was also entered in the rule. *Read v. Jeauson*, Hil. 13 Geo. 3. B. R. cited 362

See JURISDICTION, No. 5, 6, 7.

### LORDS' ACT.

See BILLS OF EXCHANGE, No. 12. COSTS, No. 8. INSOLVENT, No. 2, 3.

### LOTTERY.

1. The printer of a newspaper publishing an illegal proposal for gambling in the lottery incurs a penalty under 22 Geo. 3. c. 47. s. 13., which enacts that no person shall sell the chances of tickets, &c, nor publish any proposal for it, under a penalty of 50*l*. *King & T. v. Smith*, Mich. 32 Geo. 3. 414

See AFFIDAVIT, No. 2. 5. 7.

### M.

### MAINTENANCE.

1. COMMENT on the doctrine of, per Buller, J. 340

### MALICIOUS PROSECUTION.

1. An action lies for a malicious prosecution, though the plaintiff were acquitted on a defect in the indictment. *Wicks v. Fentham*, E. 31 Geo. 3. 247

### MANDAMUS.

1. Mandamus to the rector to certify to the bishop the election of a lecturer refused; there being no immemorial custom for the

lecturer to use the pulpit without the rector's consent, and the lecturer being paid out of the poor-rates. *R. v. Field*, Hil. 31 Geo. 3. Page 125

2. In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation, in default of his heirs, devolves upon the king, to be exercised by his great seal; and on that ground this court refused to interfere by mandamus to compel the master and fellows of St. Catharine's Hall, Cambridge, to declare one of their fellowships vacant, and to proceed to a new election. *R. v. The Master and Fellows of St. Catherine's Hall, Cambridge*, E. 31 Geo. 3. 233

3. A mandamus to a corporation to put the corporate seal to the certificate of the election of a corporator, in order that it may be laid before the king for his approbation, is granted of course. *R. v. The Mayor, &c. of York*, Trin. 32 Geo. 3. 699

4. Therefore such a writ was granted, directed to the corporation of York, on an affidavit that the recorder, applying, had the majority of legal votes; though it was stated that the other candidate had the majority at the election, and that the corporation had already certified his election. *ib.*

5. A mandamus to county justices, to rate a parish within their jurisdiction in aid of another parish, lying within a borough, which has an exclusive jurisdiction, refused; because they have no means of enquiring into the complaint. *R. v. T. Holbeche*, Trin. 32 Geo. 3. 778

See AMENDMENT, No. 4. APPEAL, No. 4. OVERSEER, No. 1. PRACTICE, No. 39. 44.

### MANOR.

1. If the lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services; for the tenant by reason of the statute *quia emptores* must then hold of the superior lord. *Bradshaw v. Lawson*, Mich. 32 Geo. 3. 443
2. To constitute a court baron, it must be held before two free suitors at least, *ib.* *Rumsey v. Walton*, Hereford. Sum. Ass. 1760. cor. Foster, J. 446

3. In



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3. In a *quo warranto* information the defendant relied on an election by a homage consisting of twenty-three free tenants; the jury found on a special verdict that twenty-one of those persons were not free tenants; and this court held the election to be void. *R. v. Mein. Mich. 32 Geo. 3. Page 480*

See GAME LAWS.

### MARKET.

See HAWKER. TOLL, No. 1, 2, 3.

### MARRIAGE.

1. The defendant gave a promissory note to the plaintiff in consideration of the plaintiff's marrying his daughter, which marriage was had in fact, and believed to be valid and intended to be so by all parties, and after the wife's death the defendant was sued on the note; the jury, presuming a subsequent legal marriage, gave a verdict for the plaintiff, which this court refused to set aside. *Wilkinson v. Payne. Mich. 32 Geo. 3. 468*
2. A marriage in fact was sufficient to entitle the plaintiff to recover. *Per Buller, J. 470*
3. A marriage may be presumed, *ib. 469*; and *Standen v. Standen, there cited.*

### MEASURES.

1. It is illegal to sell corn by any other than the *Winchester* measure. *R. v. J. Major. Trin. 32 Geo. 3. 750*

See VARIANCE, No. 6.

### MONEY HAD AND RECEIVED, &c.

See ASSUMPSIT.

### N.

### NEW TRIAL.

1. Where the jury have found a verdict for the plaintiff upon a presumption contrary to evidence, the court will not grant a new trial, if the plaintiff be entitled to recover in conscience and equity. *Wilkinson v. Payne. Mich. 32 Geo. 3. 468*
  2. The court will not grant a new trial in an action for criminal conversation merely because the damages appear to them to be ex-
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cessive. *Duberley v. Gunning. E. 32 Geo. 3. Page 651*

3. The court will grant a new trial in a penal action on account of a mistake or misdirection of the judge. *Wilson v. Rastall. Trin. 32 Geo. 3. 753*

### NISI PRIUS.

See PRACTICE, No. 28.

### NOLI PROSEQUI.

See PRACTICE, No. 11. QUO WARRANTO INFORMATION, No. 3, 4.

### NON-RESIDENCE.

1. A curate of an augmented curacy by queen Anne's bounty is not liable to the penalties of the 21 H. 8. c. 13. for non-residence. *Jenkinson Q. T. v. Thomas. E. 32 Geo. 3. 665*
2. That act only extends to parsonages and vicarages. *ib.*

### NONSUIT.

Judgment as in case of. See PRACTICE, No. 44.

### NOTICE.

1. Generally speaking, where it is required by law that notice shall be given to a party before he shall be affected by any act, leaving it at his dwelling house is sufficient. *Jones d. Griffiths v. Marsh. Mich. 32 Geo. 3. 465*
2. But it is otherwise in the case of process to bring a party unto contempt; there personal notice is necessary. *ib.*
3. In some instances however of process, leaving it at the house is sufficient, as a subpoena out of chancery, or a *quo minus* out of the exchequer. *ib.*

See APPEAL, No. 5. REVENUE OFFICER, No. 2, 4, 5. PRACTICE, No. 29, 31, 33.

### NOTICE TO QUIT.

1. If notice to quit at *Midsummer* be given to a tenant holding from *Michaelmas*, he may insist on the insufficiency of the notice at the trial, though he did not make any objection at the time it was served, but merely said "I pay rent enough already, and it is hard to use me thus." *Oakapple v. Copous. Trin. 31 Geo. 3. 361*
  2. Where
- 10 H



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2. Where the tenant of an estate holden by the year has a dwelling house at another place, the delivery of a notice to quit to his servant at the dwelling house is strong presumptive evidence that the master received the notice, and ought to be left to the jury. *Jones d. Griffiths v. Marsh. Mich. 32 Geo. 3.* Page 464

See PRACTICE, No. 29. 31. 33.

### O.

#### OCCUPANT.

See SPECIAL OCCUPANT.

#### OCCUPY.

See SETTLEMENT BY ESTATE.

#### OFFENCE.

See INDICTMENT.

#### OFFICER.

1. The future half pay of an officer is not assignable. *Lidderdale v. The Duke of Montrose and Another. E. 31 Geo. 3.* 248
  2. The clerk of the papers in the King's Bench Prison cannot act by deputy, but must himself reside within the prison. *In the matter of Bryant. Trin. 32 Geo. 3.* 716
- See CORPORATION. REVENUE OFFICER.  
MANOR, No. 3.

#### ORDER OF REMOVAL.

1. An order of removal may be executed a year after it is signed, if the pauper's circumstances be not altered in the interval. *R. v. The Inhabitants of Llanwinio. Mich. 32 Geo. 3.* 473
2. An alteration in an order of removal by one justice in the presence of the other, before it is delivered to the parish officers, does not vitiate it. *ib.*
3. An order of removal signed by two justices separately, and in different counties, is only voidable, not void; and the parish wishing to avoid it must appeal to the next sessions. *R. v. The Inhabitants of Stotfold. E. 32 Geo. 3.* 596

#### OVERSEER.

1. If, on an appeal against overseer's accounts, the sessions disallow some of the items, and do not order the overseers to pay the ba-

lance to the successors, two justices out of sessions may enforce payment of the balance; and if they refuse to interfere, this court will grant a *mandamus* to compel them to hear the complaint. *R. v. Carter. E. 31 Geo. 3.* Page 246

2. Where a parish consisted of two separate districts, each of which immemorially made a separate rate, but the money when raised was blended together in one joint fund, though applied in certain proportions, and the sessions did not find it as a fact that the parish could not reap the benefit of the 43 *Eliz.* it was held that the districts were not entitled to maintain their own poor separately, though since the year 1648 they had constantly had, on the whole, more than four overseers, some of whom were chosen separately by the hamlet, and though the hamlet part had immemorially had a constable of its own, and since 1709 certificates had been granted to and from the hamlet to third parishes, and orders of removal made to and from it. *R. v. T. Newell. E. 31 Geo. 3.* 266
  3. An order of justices which appointed A, "being a substantial householder of the parish of B., to be overseer of the poor for the hamlet of C. in the said parish," was confirmed generally at the sessions with costs; and both those orders were affirmed here. *R. v. Morris. Hil. 32 Geo. 3.* 550
  4. Overseers for a parish need not be appointed by one and the same instrument. *ib.* 552
  5. An appointment of an overseer of the poor "for the year next ensuing" will be understood to be for the overseer's year. *R. v. J. Burder. Trin. 32 Geo. 3.* 778
- See INDICTMENT, No. 5.

#### OUTLAWRY.

1. In a record of outlawry it appeared by the writ of proclamation and the return to it that the prisoners were required to *render themselves to the sheriff, so that he might have their bodies before the justices, &c.* at the return of the writ, and held good. *R. v. Tandell. Hil. 32 Geo. 3.* 521
2. If one exigent be awarded against the principal and accessory together, it is error only as to the latter. *ib.*
3. The



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3. The stat. 25 Ed. 3. ft. 5. c. 14. does not apply to a court of *oyer* and *terminer* and gaol delivery. Page 521

4. If it appear on the record that the writ of proclamation was delivered to the sheriff three months before the return of it, it is sufficient, though it be not so expressly alleged. *ib.*

5. The writ of proclamation required the sheriff to proclaim the parties in *open court in the sheriff's county*, (not *laying county court*), and held good. *ib.*

6. The sheriff need not allege in his return to the writ of proclamation that "the persons proclaimed did not appear and render themselves", though he must in his return to the exigent. *ib.*

7. The names of the coroners need not be subscribed to the judgment of outlawry: if it appear on the record that the judgment of outlawry was given by them, it is sufficient. *ib.*

8. It need not appear on a record of outlawry that the *captas* and exigent were sealed by the justices of *oyer* and *terminer*, &c. *ib.*

9. If it be stated that the justices of our lord the king were assigned by letters patent under his seal of Great Britain, it will be presumed to be the Great Seal. *ib.*

10. A person outlawed on an indictment for sheep-stealing is ousted of clergy by 14 Geo. 2. c. 6. s. 1.; "outlawry" being a "conviction" within the meaning of that statute. *ib.*

See VARIANCE, No. 4.

### OYER.

See PRACTICE, No. 13, 14.

### P.

### PARISH.

See OVERSEERS, No. 2, 3, 4.

### PAROL TO DEMUR.

1. An infant cannot pray the parol to demur in any other stage of the proceedings than at the time of pleading. *Derisley v. Cufstance.* Mich. 31 Geo. 3. 77

### PARTNERS.

1. Acts subsequent to the time of delivering goods on a contract may be admitted as evidence to shew that the goods were delivered on a partnership account, if it were doubtful at the time of the contract: but if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person, who may afterwards become a partner, (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods) will make him liable in an action for goods sold and delivered; though he will be liable in an action on the bill of exchange. *Saville v. Robertson.* Trin. 32 Geo. 3. Page 720

See DEED.

### PAYING MONEY INTO COURT.

See COSTS, No. 1, 2, 7.

### PENAL STATUTES.

See CONVICTION, No. 5. INDICTMENT, No. 1. JURISDICTION, No. 1, 2, 3, 4. NEW TRIAL, No. 3. PLEADING, No. 27.

### PENALTIES.

See COSTS. LOTTERY.

### PERJURY.

See WITNESS, No. 6.

### PHYSICIAN.

1. A physician cannot maintain an action for his fees. *Chorley v. Bolcot.* Trin. 31 Geo. 3. 317

### PLEADING.

1. The heir may be charged as assignee in covenant which runs with the land. *Derisley v. Cufstance.* Mich. 31 Geo. 3. 75  
2. An infant cannot pray the parol to demur in any other stage of the proceeding than at the time of pleading. *ib.*  
3. A plea of bankruptcy given by the 5 Geo. 2. c. 30. s. 7. must state that the cause of action accrued before the bankruptcy; stating that an indenture, on which an action of covenant is brought, was executed prior to the bank-



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- bankruptcy is not sufficient. *Charlton v. King. Hil. 31 Geo. 3. Page 156*
4. If to trespass in the common called *A.* the defendant plead that *A.* and *B.* commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the whole prescription. *Morewood v. Wood. Hil. 31 Geo. 3. 157*
5. For all prescriptions are entire, and, when pleaded, the adverse party cannot deny a part only, but must deny the whole. *ib.*
6. A defendant cannot plead *non assumpsit* as to the whole, and a tender as to part. *Maclellan v. Howard. Hil. 31 Geo. 3. 194*
7. A plea in abatement is bad after a general imparlance. *Evans 2. T. v. Stevens. E. 31 Geo. 3. 224*
8. So it is, if it do not give a better writ, but tend to shew that the plaintiff hath no action at all. *ib.*
9. A plaintiff cannot join in the same declaration a cause of action as executor with another which accrued in his own right. *Cockerill et Ux. Executrix &c v. Kynaston. E. 31 Geo. 3. 277*
10. Where the goods of the testator never were in the possession of the executor, he must declare in that character. *ib.*
11. And whether the conversion happened before or after the testator's death, if the goods when recovered will be assets in the hands of the executor, he may sue for them in that character. *ib.*
12. A count on a promise made by defendant as administrator to pay money received by him as such to the plaintiff's use cannot be joined with other counts on promises made by the intestate. *Jennings v. Newman. Trin. 31 Geo. 3. 347*
13. After a demurrer to a declaration of two counts against two defendants, because one of them was not named in the last count, plaintiff cannot enter a *noli prof.* on that count and proceed on the other. *Drummond v. Dorant. Trin. 31 Geo. 3. 360*
14. If to an action of trespass for pulling down and carrying away a gate the defendant plead a right of way, and that the gate being wrongfully erected across the same he took it down and deposited it in a convenient place for the use of the plaintiff, to which the plaintiff replies a subsequent conversion; proof that the defendant put the gate upon his own premises, from whence the plaintiff might have taken it if he had pleased, will not sustain the replication. *Houghton v. Butler. Trin. 31 Geo. 3. Page 364*
15. If defendant, after craving oyer of a deed, do not set forth the whole deed, the plaintiff may sign judgment as for want of a plea; or the court will quash the plea. *Wallace v. The Dutcheffs of Cumberland. Trin. 31 Geo. 3. 370*
16. To a *quo warranto* information the defendant derived a title in his plea to the office of a burgess under a custom for the common council to admit *ad libitum* any person of the age of twenty-one whom they chose; the prosecutor, after denying that custom, replied that no person was entitled to be admitted but in right of servitude, and that the defendant had not served a seven years apprenticeship; rejoinder stating the special circumstances under which he had served: On a demurrer to this rejoinder, because it was a departure from the plea, the court held the replication itself to be bad, as immaterial to the title in the plea; and gave judgment for the defendant. *R. v. Knight. Mich. 32 Geo. 3. 419*
17. The defendant in a *quo warranto* information derived title under a custom for "the mayor and burgeses of *N.* in common council assembled, under their various names of incorporation, from time immemorial till the granting of letters patent by *Q. Elizabeth*, and for the mayor, bailiffs, and capital burgeses, in common council assembled since that time" to admit every person of the age of twenty-one whom they chose; after verdict for the defendant establishing this custom the court held it well pleaded; it appearing to them to have been always exercised by the same body, *sc.* the common council, though constituted of different persons at different times. *425*
18. To trespass for fishing in the plaintiff's fishery, the defendant pleaded that the place is an arm of the sea in which every subject has a right to fish; the plaintiff in his replication claimed an exclusive right by prescription, traversing the general right; held that the defendant ought to take issue on the traverse, and not to traverse the prescriptive right claimed by the plaintiff; for the first traverse is a material one, and will put in issue the true question



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- question in dispute between the parties. *Mayor, &c. of Orford v. Richardson, Mich. 32 Geo. 3.* Page 437
19. Replevin for taking the plaintiff's goods and chattels, to wit, a lime-kiln; avowry for rent; plea in bar that the lime-kiln was affixed to the freehold; the Court held the plea in bar bad, because it was a departure from the declaration, which had treated the lime-kiln as a chattel. *Niblet v. Smith, Hil. 32 Geo. 3.* 504
20. When a declaration is delivered before the essoign day of a term, with a rule to plead in the four first days of that term, the defendant cannot plead within that time in abatement, without a special imparlance. *Doughty v. Lascelles, Hil. 32 Geo. 3.* 520
21. Where executors pay a sum of money on account of the testator, which they need not have done, and bring an action to recover it back, they must declare in their own right, and not as executors. *Munt v. Stokes, Hil. 32 Geo. 3.* 565
22. To debt on an annuity bond, defendant pleaded no such memorial as the statute requires, to which plaintiff replied that there was a memorial which contained the names of the parties, &c. and the consideration for which the annuity was granted; the defendant rejoined that the consideration was untruly alleged in the memorial to have been paid to both obligors, for that one of them did not receive any part of it; the rejoinder was held bad; first, because it was a departure from the plea; secondly, because the fact alleged respecting the memorial did not contradict the replication; for the consideration might have been paid to the other obligor on account of himself and the co-obligor, or to a stranger for them both. *Praed v. The Dutchess of Cumberland, E. 32 Geo. 3.* 585
23. A charter of W. 3. granted to the town of *Liverpool*, directs that the common council-men shall be elected in such manner as was used before a former charter of Car. 2.; the defendant, to a *quo warranto* information for exercising the office of common council-man, pleaded, that before the charter of Car. 2. the mayor, bailiffs, and burgesses, used to elect (except at those times when there was any bye-law to regulate the mode of election;) it was held that the plea was bad, because it did not shew what was the usage in fact before the charter of Car. 2. *R. v. J. Birch, E. 32 Geo. 3.* Page 608
24. If a bond be given to husband and wife, administratrix, the husband alone may declare on it as on a bond made to himself. *Ankerstein v. Clarke, E. 32 Geo. 3.* 616
25. In alleging a breach of covenant, which was for quiet enjoyment, it is sufficient to allege that at the time of the demise to the plaintiff *A. B.* had lawful right and title to the premises, and having such lawful right and title entred, &c. and evicted him, &c.; without shewing what title *A. B.* had; or that he evicted the plaintiff by legal process, &c. *Foster v. Pierson, E. 32 Geo. 3.* 617
26. Alleging that "the party having a lawful right and title entered," is equivalent to saying "he entered by lawful right and title." *ib.* 621
27. The *stat. 4 Ann. c. 16.*, which allows double pleading, does not extend to penal actions. *Heyrick v. Foster, Trin. 32 Geo. 3.* 701
28. When a plaintiff in possession brings an action on the case against a wrong-doer, it is sufficient to declare generally, without disclosing any title: but when a defendant justifies under a right, it must be set out formally in the plea. *Grimstead v. Marlowe, Trin. 32 G. 3.* 718
29. Whether contemporaneous usage in a corporation may be pleaded in order to control the words of a charter? *quare. R. v. Bellringer, Trin. 32 Geo. 3.* 821
- See AMENDMENT. BARON AND FEME, No. 2, 3, 4. COVENANT. PRACTICE. No. 35. RENT. REPLEVIN, No. 2.
- POLICY.
- See INSURANCE.
- POOR.
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- See QUO WARRANTO INFORMATION, No. 7.
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### POWER.

See DEVISE, No. 15. LIMITATIONS.

### PRACTICE.

1. The clerk of the rules shall keep a book for entering rules in ejectments, containing a list of the ejectments moved, the number of the entry, the county, and the names of the parties; and the rule for judgment shall be drawn up and taken away from the office within two days after the end of the term in which the ejectment shall be moved. *Reg. Gen. Mich. 31 Geo. 3. Page 1*
2. Plaintiff cannot sign judgment for want of a plea till the expiration of 24 hours after demand of a plea, whether the time for pleading be or be not expired when such demand is made. *Bowles v. Edwards, Mich. 31 Geo. 3. 118*
3. If the sheriff appoint a special bailiff at the plaintiff's request, the latter cannot rule the sheriff to return the writ. *De Moranda v. Dunkin, Mich. 31 Geo. 3. 119*
4. The court will not discharge a defendant out of custody on filing common bail, on the ground that he was insane at the time of the arrest. *Nutt v. Verney, Mich. 31 Geo. 3. 121*
5. A defendant has four clear days after final judgment to put in bail in error. *Bennet v. Nichols, Mich. 31 Geo. 3. ib.*
6. The court will permit a devisee, not having been in possession, to defend in ejectment as landlord, under 11 Geo. 2. c. 19. s. 13. *Lovecock v. Norris v. Dancaster, Mich. 31 Geo. 3. 122*
7. When a rule to set aside proceedings for irregularity, and to stay proceedings in the mean time, is obtained, the proceedings are suspended for all purposes till the rule is disposed of. *Swayne v. Crammond, Hil. 31 Geo. 3. 176*
8. And therefore the time for putting in bail remains the same after the rule is discharged, as it was when it was granted. *ib.*
9. On a rule to plead, reply, &c, in four days, if the party on whom the rule is made delay complying with it till the morning of the fifth day, the adverse party may refuse to receive it, and sign judgment. *Thomson v. Ryall, Hil. 31 G. 3. 195*
10. Where bail are put in after attaching the sheriff, and a trial has not been lost, the Court will set aside the attachment; for in this case the plaintiff is not entitled to the benefit of it as a security, in case he should recover: *secus*, if a trial has been lost. *Hill v. Bolt, Trin. 31 Geo. 3. Page 352*  
*Gravett v. William, Trin. 15 Geo. 3. B. R. ib. n.*
11. After demurrer to a declaration of two counts against two defendants, because one of them was not named in the last count, plaintiff cannot enter a *nol. prof.* on that count, and proceed on the other. *Drummond v. Dorant, Trin. 31 Geo. 3. 360*
12. Plaintiff cannot sign judgment for the defendant's refusing to pay 4*d.* for the warrant of attorney when the copy of the declaration is delivered to him. *Oneale v. Price, Trin. 31 Geo. 3. 370*
13. If defendant, after craving oyer of a deed, do not set forth the whole deed, the plaintiff may sign judgment as for want of a plea; or the Court will quash the plea. *Wallace v. The Dutcheffs of Cumberland, Trin. 31 Geo. 3. 370*
14. Where the defendant, in an action of debt on bond, after craving oyer, and setting it out truly, pleaded payment, on which the plaintiff took issue, and served defendant's attorney with a rule to abide, &c, and gave notice of trial; and afterwards defendant returned the paper book, setting out a false oyer of the bond, and pleading as before, on which plaintiff enrolled the true condition, and demurred; the Court ordered all the pleadings to be struck out, and that plaintiff should have judgment, and that the defendant's attorney should pay all the costs. *Ferguson v. Mackreth, Hil. 24 Geo. 3. B. R. cited ib. 371*
15. Where the action is by original, the defendant has till four days after the *quarto die post* to put in bail. *Frampton v. Barber, Trin. 31 Geo. 3. 377*
16. Where any sheriff before his going out of office shall arrest any defendant, and a *cepi corpus* be returned, he may within the legal time allowed be called upon to bring in the body, tho' he may be out of office before such rule be granted. *Reg. Gen. Trin. 31 Geo. 3. 379*
17. Trying



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17. Trying a feigned issue without the consent of the Court is a contempt of the Court; and after such a trial they will stay the proceedings. *Hofkins v. Lord Berkeley*, Mich. 32 Geo. 3. Page 402
18. The Court will not set aside a defendant's execution for the costs of a nonsuit sued out after allowance of a writ of error, because the writ of error can only be for delay. *Kempland v. Macauley*, Mich. 32 Geo. 3. 436
19. If a record be ever so erroneous, the plaintiff, who has made default by suffering a nonsuit, can never have a judgment afterwards in his favour. *ib.*
20. Where defendant's attorney in effect told the plaintiff that the writ of error was brought for delay, the Court refused to stay proceedings pending it. *Law v. Smith*, Mich. 30 Geo. 3. B. R. 436. n.
21. The same on a similar declaration by one of the bail. *Evans v. Gilbert*, Trin. 31 Geo. 3. B. R. *ib.*
22. When a defendant, who has suffered judgment by default in a criminal prosecution, is brought up for judgment, each party should come prepared with affidavits disclosing his own case [if he mean to produce any affidavit at all;] but if in the course of the inquiry the Court wish to have any point further explained, they will give the defendant an opportunity of answering it on a future day. *R. v. Wilson*, Mich. 32 Geo. 3. 487
23. The defendant having suffered judgment by default in an action of assumpsit on a foreign judgment, the Court would not refer it to the Master to see what was due, and give the plaintiff leave to enter up final judgment for such sum, without executing a writ of enquiry. *Messin v. Lord Massacrene et Ux.* Mich. 32 Geo. 3. 493
24. Bail is not regularly put in till the allowance of it has been served, even tho' the plaintiff oppose the justification. *R. v. Sheriff of Middlesex*, Mich. 32 Geo. 3. 493
25. And the sheriff is liable to an attachment for not bringing in the body, if the allowance be not served, tho' the bail justified. *ib.*
26. If it appear to the Court that the debt sued for is under 40s. they will, on motion, stay the proceedings before trial. *Kennard v. Jones*, Mich. 32 Geo. 3. 495
27. All writs must be returned by the sheriff on the day on which the rule for returning the same expires; and in default thereof the plaintiff is at liberty to move for an attachment on the next day. *Reg. Gen.* Mich. 32 Geo. 3. Page 496
28. The defendant in ejectment is entitled to the general reply, where the plaintiff claiming by descent proves his pedigree and stops, and the defendant sets up a new case in his defence, which is answered by evidence on the part of the plaintiff. *Goodtitle d. Revett v. Brabam*. Trial at bar, Hil. 32 Geo. 3. 497
29. If one of several defendants reside within 40 miles of London, it is not necessary to give the 10 days notice of trial required by 14 Geo. 2. c. 17. s. 3. *Per Ashurst, J.* in *Perry v. Jackson*, Hil. 32 Geo. 3. 520
30. When a declaration is delivered before the effoign day of a term, with a rule to plead in the four first days of that term, the defendant cannot plead within that time in abatement without a special imparlance. *Doughty v. Lascelles*, Hil. 32 Geo. 3. 520
31. The venue was in London, and verdict for plaintiff without defence, which was set aside, because only eight days notice of trial was given, the defendant residing in India. *Douglas v. Ray*, Hil. 32 Geo. 3. 552
32. If a plea be demanded on a Saturday, the defendant has 24 hours to plead after the demand, exclusive of Sunday. *Solomons v. Freeman*, Hil. 32 Geo. 3. 557
33. If issue in a London cause be joined early enough in a term to enable the plaintiff to give notice of trial for the sittings after that term, the defendant is not entitled to judgment as in case of a nonsuit for not proceeding to trial, unless the plaintiff has in fact given notice of trial. *Munt v. Tremamondo*, Hil. 32 Geo. 3. *ib.*
34. Where several persons have separately incurred penalties for printing illegal schemes of the lottery, a separate affidavit must be made and filed against each of them; and if they be all joined in one affidavit, the irregularity is not waved by their putting in bail: but the Court, on motion, will stay the proceedings against all of them. *Good-*



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- Goodwin Q. T. v. Parry, Hil. 32 Geo. 3.*  
Page 577
35. If a plea be filed before the bail are perfected, it is a nullity, and does not become a good plea by perfecting the bail afterwards. *Venn v. Calvert, Hil. 32 Geo. 3.* 578
36. On every appointment by the master, the party served shall attend such appointment without waiting for a second; otherwise the master shall proceed *ex parte* on the first appointment. *Reg. Gen. Hil. 32 Geo. 3.* 580
37. A *scire facias* must lie in the sheriff's office the last four days before the return. *Forty v. Hermer, E. 32 Geo. 3.* 583
38. A bill of *Middlesex* may be returnable the same day that it is sued out. *Oxlade v. Davidson, E. 32 Geo. 3.* 610
39. The defendant in an information on 24 Geo. 3. c. 26. s. 64. must make his application for a mandamus for the examination of witnesses within the four first full days, if at all, after plea pleaded. *R. v. Holland, E. 32 Geo. 3.* 662
40. When there is only one *scire facias* against bail, and the proceedings are by bill, there need be only four days exclusive between the teste and return of it. *Bell v. Jackson, E. 32 Geo. 3.* 663
41. When a prisoner pleads, he must give the plaintiff notice of his plea. *Thomas v. Prichard, E. 32 Geo. 3.* 664
42. If a plaintiff do not proceed to trial or judgment within three terms against the defendant (a prisoner,) the latter is not entitled to be discharged until the expiration of the third term. *ib.*
43. If an action be brought on a judgment, which is irregular, the whole proceedings may be set aside in one rule. *Barlow v. Kaye, E. 32 Geo. 3.* 688
44. Judgment as in case of a nonsuit may be given in a traverse of a return to a mandamus. *R. v. The Mayor, &c. of Stafford, E. 32 Geo. 3.* 689
45. If separate actions be brought against the acceptor and indorsers of a bill, the Court will stay the proceedings against any of the indorsers on payment of the bill and costs of that action, but not against the acceptor without payment of costs in all the actions. *Smith v. Woodcock, E. 32 Geo. 3.* Page 691
46. Only the defendant or defendants in one action can be included in a bailable writ: *secus*, if the writ be not bailable. *Holland v. Johnson, E. 32 Geo. 3.* 695
47. The Court will not stay the proceedings till the plaintiff, a foreigner, give security for the costs, unless the defendant have put in bail. *De la Preuve v. The Duc de Biron, E. 32 Geo. 3.* 697
48. The Court will permit a defendant to carry a record of an issue, directed by chancery, down to trial, on a suggestion that the plaintiff intends to delay it. *Humpage v. Rowley. Trin. 32 Geo. 3.* 767
- See AFFIDAVIT, No. 3. 5. 6. 7. ATTORNEY, No. 1, 2, 3, 4, 6. BELLS OF EXCHANGE, No. 8. COSTS, No. 1, 2. 7. INSOLVENT, No. 2, 3. NOTICE.
- ### PREROGATIVE.
- See EXTENT. RATES. N. 3.
- ### PRESCRIPTION.
- See CUSTOM. PLEADING, No. 4, 5. 16, 17, 18.
- ### PRESUMPTION.
- See MARRIAGE, No. 1. 3.
- i. In the case of a plain trust, where the trustees were directed to convey to a devisee on his attaining 21, the jury may be directed to presume a conveyance at any time afterwards, though considerably less than 20 years. *England d. Syburn v. Slade, E. 32 Geo. 3.* 682
- See DEVISE, No. 14, 15. MARRIAGE, No. 1, 3. OUTLAWRY, No. 9.
- ### PRINTER.
- See LOTTERY.
- ### PRISONER.
- i. A warrant of attorney to confess judgment executed by a prisoner in custody on criminal process is good, tho' he have no attorney



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attorney present. *Charlton v. Fletcher, Mich.*  
32 Geo. 3. Page 433

See COSTS, No. 8. INQUISITION. INSOL-  
VENT, No. 2, 3. PRACTICE, No. 41, 42.

### PRIVILEGE.

See ARREST.

### PRIZE.

1. The prize courts and courts of lords com-  
missioners of appeals have the sole and ex-  
clusive jurisdiction over the question of  
prize or no prize, and who are the captors,  
notwithstanding any of the prize acts; and  
if they pronounce a sentence of condemna-  
tion, adjudging also who are the captors,  
the courts of common law cannot examine  
the justice or propriety of it, even though  
perhaps they would have put a different con-  
struction on the prize acts. And the same  
courts have power to enforce their decrees.

*Lord Camden v. Hume, in error. Mich.*

32 Geo. 3.

382

2. Therefore where the lords commissioners  
had issued a monition after sentence to a  
navy agent, employed by persons supposed  
to be entitled to the prize, requiring him to  
bring the produce of it into court to be dis-  
tributed among the persons declared to be  
entitled by their sentence, this court refused  
to grant a prohibition. *ib.*

### PROBATE.

1. The only way of proving a right to personal  
property under a will is by the probate.  
*R. v. The Inhabitants of Netherfeal. E.*  
31 Geo. 3. 258

### PROHIBITION.

1. Prohibition was granted to stay a suit in  
the spiritual court for breaking open a chest  
in the church, and taking away the title-  
deeds to the advowson. *Gardner v.*  
*Parker. Trin. 31 Geo. 3.* 351

See PRIZE.

### PROMISSORY NOTES.

See BILLS OF EXCHANGE.

### PUBLICATION.

See LIBEL. LOTTERY.

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### PURCHASER.

See DEVISE. LIMITATIONS.

### Q.

### QUARANTINE.

1. THE 26 Geo. 2. c. 6. f. 1. enacts that all  
persons going on board ships, coming  
from infected places, shall obey such orders  
as the king in council shall make, without an-  
nexing any particular punishment; the dis-  
obedience of such an order is an indictable  
offence, and punishable as a misdemeanor  
at common law. *R. v. J. Harris. Hil.*  
31 Geo. 3. Page 202

2. *Quere*, whether the penalties in the 5th  
sect. of the act attach on any other than the  
captain, seamen, or passengers? *ib.*

### QUIA EMPTORES.

See MANOR, No. 1.

### QUO WARRANTO, Information in nature of.

1. An application for a *Q. W.* information  
made on the affidavits of several persons,  
of whom all but one have consented to the  
election proposed to be impeached, may  
be granted on the affidavit of that one, if  
he avow himself to be the relator. *R. v.*  
*Symmons. E. 31 Geo. 3.* 223
2. Upon a question concerning the validity of  
an election to a vacant fellowship made by  
the fellows of *Trinity Hall, Cambridge*, which  
was disputed by the master, the court held  
that an information in nature of *quo war-*  
*ranto* would not lie; but thought the pro-  
per remedy in such case was by *mandamus*,  
or by an action brought by the fellow ap-  
pointed by the master to try his right. *R.*  
*v. Gregory. E. 12 Geo. 3.* 240. n.
3. Where leave had been granted by the court  
to file an information in nature of *quo war-*  
*ranto* against a party for claiming to be com-  
mon councilman of *York*, and the relator by  
his replication attacked also the defendant's  
title as freeman, which had been stated in  
the introductory part of his plea, the court  
refused to strike it out, or direct their officer  
to enter a *noli prosequi*. *R. v. Brown. E.*  
31 Geo. 3. 276

10 K

4. When



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4. When a proper case has been laid before the court to induce them to grant an information, they have never exercised any control over it afterwards, as to the manner in which it is to be conducted. *Page 276*
  5. The court will not grant an information in nature of *Q. W.* against a person who has been in the peaceable possession of his franchise six years. *R. v. Dickin, Hil, 31 Geo. 3.* 282
  6. The court will not grant a *quo warranto* information to try the validity of an election to the office of churchwardens, because it is no usurpation on the crown. *R. v. Shepherd. Mich. 32 Geo. 3.* 381
  7. The defendant relied on an election to the office of portreeve by a homage consisting of twenty-three free tenants; the jury found on a special verdict that twenty-one of those persons were not free tenants; and this court held the election to be void. *R. v. Mein. Mich. 32 Geo. 3.* 480
  8. The court will not grant a *quo warranto* information to impeach a derivative title, if the person claiming the original title has been in the undisturbed possession of his office six years. *R. v. G. Peacock. E. 32. Geo. 3.* 684
- See Costs, No. 8. PLEADING, No. 16, 17.*

R.

### R A T E S.

1. **H**OUSES built on land embanked from the *Thames* in pursuance of the 7 *Geo. 3. c. 37.* which vests those lands in the owners free from taxes, are not liable to be assessed to the general land tax imposed by 27 *Geo. 3.*, though the latter is conceived in general terms, and is subsequent in point of time to the act creating the exemption. *Williams v. Pritchard. Mich. 31 Geo. 3.* 2
2. Nor are they liable to be assessed to the rates made under the 11 *Geo. 3. c. 29.* *Eddington v. Borman. Mich. 31 Geo. 3.* 4
3. The owner of stables in *Marybone*, which were rented by the colonel of a troop of horse, for the use of the troop, (by the authority of the king), is liable to be assessed for them to the rates made under *stat. 10 Geo. 3. c. 23.* for paving &c. *Marybone*

4

parish. *Eckersall v. Briggs. Mich. 31 Geo. 3.* Page 6

*See APPEAL.*

### R A T E - P O O R.

1. Appeal against it must be to the sessions next after the allowance of it. *R. v. J. Atkins. Mich. 31 Geo. 3.* 12
2. And if at a subsequent sessions it be dismissed for not having been made in time, and it be removed by *certiorari* into *B. R.* the court will not go into any objection appearing upon the face of it. *ib.*
3. A barge-way and toll-gate in the hamlet of *Hampton-wick*, purchased by the city of *London* by virtue of the 17 *Geo. 3. c. 18.* (for completing the navigation of the *Thames*, and empowering the city to levy tolls and duties towards the charges of the navigation) are rateable towards the relief of the poor for such tolls as become due there, notwithstanding the tolls are collected in another parish. *R. v. The Mayor &c. of London. Mich. 31 Geo. 3.* 21
4. Where a parish consisted of two separate districts, each of which immemorially made a separate rate, but the money when raised was blended together in one joint fund, though applied in certain proportions; and the sessions did not find it as a fact that the parish could not reap the benefit of the 43 *Eliz*; it was held that the districts were not entitled to maintain their own poor separately, though since 1648 they had constantly had in the whole more than four overseers, some of whom were chosen separately by the hamlet, and though the hamlet had immemorially had a constable of its own, and since 1709 certificates had been granted to and from the hamlet to third parishes, and orders of removal made to and from it. *R. v. T. Newell. E. 31 Geo. 3.* 266
5. If a poor rate be not published in the church on the Sunday next after it is allowed, it is a nullity; and payment under it cannot be enforced, though there be an appeal to the sessions which was dismissed. *R. v. Newcombe. Trin. 31 Geo. 3.* 368
6. If a party appeal against a poor rate on the ground that he has no rateable property in the

the



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the parish, the respondents must first establish their case. *R. v. The Inhabitants of Newbury.* Mich. 32 Geo. 3. Page 475

7. If the owner of an house occupy part of it, he is liable to be rated to the poor for the whole, unless there be a distinct occupation of the rest by some other person. *R. v. The Inhabitants of St. Mary the Less, Durham.* Mich. 32 Geo. 3. 477
8. Where by a navigation act the proprietor was entitled to a toll of four shillings per ton for goods carried from *A.* to *B.* or from *B.* to *A.* and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection; it was held that the tolls for goods carried the whole voyage from *A.* to *B.* are rateable in *B.* though in fact they are collected in a parish between *A.* and *B.*; because the tolls become due where the voyage is completed. *R. v. Page.* Hil. 32 Geo. 3. 543
9. Property is not rateable to the poor, unless there be some person in the beneficial occupation of it. *R. v. The Commissioners of Salter's Load Sluice Navigation.* Trin. 32 Geo. 3. 730
10. Therefore where by an act of parliament the commissioners of a navigation were authorised to take certain tolls, the whole of which were directed to be applied to public purposes, it was held that the tolls were not rateable to the poor. *ib.*
11. Ships are rateable to the poor in the parish to which they belong. *R. v. S. White.* Trin. 32 Geo. 3. 771
12. So is stock in trade. *ib.*
13. But household furniture is not. *ib.*
14. Neither is money, whether at interest or not. *ib.*
15. Nor the pay of officers in the navy, or of merchants' ships. *ib.*
16. Nor the salaries of officers of the customs, or of merchants' clerks. *ib.*
17. County justices cannot rate a parish within their jurisdiction, in aid of another parish, lying within a borough, which has an exclusive jurisdiction, though within the same hundred and county. *R. v. T. Holbeche.* Trin. 32 Geo. 3. 778
18. For the justices of the county, having no jurisdiction in the borough, have no means of enquiring into the truth of the complaint. *ib.*

See APPEAL. WITNESS, No. 1.

### RECOGNIZANCE.

See COSTS, No. 3. SHERIFF, No. 2, 3.

### REMAINDER.

See DEVISE. LIMITATIONS.

### REMOVAL.

See ORDER OF REMOVAL.

### RENT.

1. To an avowry for rent the tenant may plead payment of a ground rent to the original landlord. *Sapsford v. Fletcher.* Hil. 32 Geo. 3. Page 511
2. But there can be no set off to an avowry for rent. *ib.* 512. and *Graham v. Fraime.* Hil. 24 Geo. 2. and *Laycock v. Tuffnell.* E. 27 Geo. 3. *ib.*

### REPAIRS.

See FENCES.

### REPLEVIN.

1. In an action against the sheriff for taking insufficient pledges in replevin the plaintiff cannot recover damages beyond the value of the distress. *Yea v. Lethbridge.* Mich. 32 Geo. 3. 433
  2. A judgment in replevin "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury" &c. is good either as a judgment at common law, though the return be not adjudged irreplevifable, or as a judgment under 21 Hen. 8. c. 19. which entitles the defendants to damages and costs. *Gamon v. Jones, in error.* Hil. 32 Geo. 3. 509
- See PLEADING, No. 19. RENT.

### RESIGNATION BOND.

1. Qu. whether a bond of resignation with condition to reside, to resign for the patron's son to be presented, and to keep the premises on the living in repair, be not good in law? *Partridge v. Whiston.* Trin. 3. Geo. 3. 359
- See BOND, No. 1, 2.



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### REVENUE OFFICER.

1. If a revenue officer seize goods as forfeited which are not liable to seizure, and take money of the owner to release them, the latter may recover back the money in an action for money had and received. *Irving v. Wilson. Mich. 32 Geo. 3. Page 485*
2. In such an action a month's notice need not be given under 23 Geo. 3. c. 70. *ib. f. 30.*
3. The 9 Geo. 2. c. 35. f. 26., which enacts that prosecutions for assaults on revenue officers may be tried in any county, only extends to assaults on them *quâ* officers: And a defendant having been found guilty on an indictment of a common assault on the prosecutor, who was in fact an excise officer, this court arrested the judgment, though the prosecutor was described to be an excise officer, the offence being laid in *Surry*, and the venue in *Middlesex*. *R. v. Cartwright. Mich. 32 Geo. 3. 490*
4. Assumpsit for money had and received does not lie against an excise officer to recover duties received by him after the act imposing them is repealed, if he have paid them over to his superior. *Greenaway v. Hurd. Hil. 32 Geo. 3. 553*
5. The officer in such case is entitled to notice a month before the action is brought by 23 Geo. 3. c. 70. f. 30. *ib.*

### REVOCATION.

See LIMITATIONS, No. 1, 2, 3.

### RIOT.

See SHERIFF, No. 5.

### RULES OF COURT.

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| 1. Ejectments. <i>Mich. 31 Geo. 3.</i>                   | 1        |
| 2. Affidavit, No. 3. <i>E. 31 Geo 3.</i>                 | 284      |
| 3 Sheriff. <i>Trin. 31 Geo. 3.</i>                       | 379      |
| 4 Attorney. <i>Trin. 31 Geo. 3.</i>                      | 379, 492 |
| 5. Return of writ. <i>Mich. 32 Geo. 3.</i>               | 496      |
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### SALARIES.

See RATE-POOR, No. 15, 16.

### SCIRE FACIAS.

See PRACTICE, No. 37, 40.

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See FISHERY.

### SEAL.

See OUTLAWRY, No. 9.

### SEALING.

See DEED.

### SECURITY FOR COSTS.

See PRACTICE, No. 47.

### SEIZURE.

See REVENUE OFFICER, No. 1.

### SERVICES.

See MANOR, No. 1.

### SESSIONS.

1. If the sessions draw a conclusion of fact that the taking of a tenement is fraudulent, or that it does not amount to 10*l. per ann.* it is decisive here, though they state all the facts, and refer the consideration of those questions to the court. *R. v. The Inhabitants of Llanwinio. Mich. 32 Geo. 3. Page 473*
  2. The court will refer an attorney's bill to be taxed, though all the business be done at the quarter sessions. *Ex parte Williams. Mich. 32 Geo. 3. 496*
  3. The sheriff has no authority to take a bond for the appearance of persons arrested by him under process issuing upon an indictment at the quarter sessions for a misdemeanor; he can only take a recognizance for their appearance. *Bengough v. Rossiter. Hil. 32 Geo. 3. 505*
- See APPEAL. ATTORNEY, No. 3. COSTS, No. 3. COUNTY STOCK. OVERSEER. No. 1. RATE-POOR, No. 1.



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### SET-OFF.

1. If *A.* recover against *C.* and *C.* recover against *A.* and *B.*; the court will permit *C.* on motion to set off the damages which he has recovered against those obtained by *A.* on his undertaking that the bill of *A.*'s attorney in the first action shall be satisfied, he having a lien on the judgment for his costs. *Mitchell v. Oldfield.* Hil. 31 Geo. 3.

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2. There can be no set off to an avowry for rent. *Sapsford v. Fletcher.* Hil. 32 Geo. 3. 511. and *Graham v. Fraine.* Hil. 24 Geo. 2. and *Laycock v. Tuffnell.* E. 27 Geo. 3. 123
- See BANKRUPT, No. 5. RENT.

### SETTLEMENT BY APPRENTICESHIP.

1. Serving forty days under an indenture of apprenticeship to an infant will give a settlement. *R. v. Inhabitants of St. Petrox, Dartmouth.* Hil. 31 Geo. 3. 196
  2. Money given by the parish officers, in the case of a voluntary binding, as the consideration of taking an apprentice is not liable to the duty imposed by the 8 Ann. c. 9. s. 35; for it comes within the exception to it, as being at the public charge of the parish. *ib.*
  3. Neither is any duty payable for any consideration money, unless it be given to, or to the use of, the master or mistress of the apprentice. *ib.*
  4. If an apprentice to a certificated person be assigned to a second master in the same parish, he cannot gain a settlement in that parish by serving the second master. *R. v. The Inhabitants of Hinckley.* Trin. 31 Geo. 3. 371
  5. If the friends of an apprentice covenant to maintain him, and to provide him with clothes, it is not such a benefit as is liable to the duty imposed by 8 Ann. c. 9. s. 25. *R. v. The Inhabitants of Leighton.* Trin. 32 Geo. 3. 732
  6. And consequently a settlement may be gained by serving 40 days under an indenture of apprenticeship, containing such a covenant, although no additional duty be paid for it. *ib.*
  7. The additional duty imposed by 8 Ann. c. 9. s. 45. only attaches on things actually
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given, or contracted to be given, to the master. Page 732

8. No settlement is gained by serving under an agreement of apprenticeship, not stamped. *R. v. The Inhabitants of Ditchingham.* Trin. 32 Geo. 3. 769

### BY BIRTH.

1. Where a certificate was granted to the pauper and his wife, which latter appeared afterwards to have had a former husband living at the time, and a child was born during the cohabitation of the pauper and his supposed wife in the certificated parish, and was baptized as their child; this was held sufficient evidence of bastardy to settle the child where born. *R. v. The Inhabitants of Lubbenham.* E. 31 Geo. 3. 251

### CERTIFICATE.

1. The infant of a person, living at *A.* under a certificate, served a year at *B.* (an extra-parochial place) under a yearly living, and then returned to *A.* under twenty-one, where he was hired and served a year; it was held that he gained no settlement in *A.* *R. v. Inhabitants of Collingbourn Ducis.* Hil. 31 Geo. 3. 199
  2. A certificate is only conclusive upon the parish granting it, with respect to that parish to which it is granted; though it is *prima facie* evidence as to others. And therefore where *A.* granted a certificate to *B.* acknowledging the pauper and his wife to be their parishioners, it was held to be competent to *A.* as between that parish and *C.* to shew that the woman supposed to be the pauper's wife had a former husband living at the time of her marriage with the pauper. *R. v. The Inhabitants of Lubbenham.* E. 31 Geo. 3. 251
  3. If an apprentice to a certificated person be assigned to a second master in the same parish, he cannot gain a settlement in that parish by serving the second master. *R. v. The Inhabitants of Hinckley.* Trin. 31 Geo. 3. 371
  4. A parish certificate only includes the certificated man, his wife, and those children who live with him; but does not extend to grand-children. *R. v. The Inhabitants of Darlington.* Trin. 32 Geo. 3. 797
- 10 L 5. Whether



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5. Whether a certificate be abandoned by the head of the family returning to the certifying parish, leaving his children in the parish to which the certificate is granted?  
*Qu.* Page 800, 801

### — BY ESTATE.

1. If *A.* residing on a cottage of his own, grant it by lease and release to *B.* in fee, in consideration of 36*l.*, with a proviso, "that *A.* shall live in and *and occupy* the said cottage with the appurtenances as he had theretofore done, for life;" *B.* only takes a remainder after an estate for life in *A.*; and therefore has not such an interest during *A.*'s life, as will enable him to gain a settlement by a residence on the estate. *R. v. Inhabitants of Easington, Hil.* 31 *Geo.* 3. 177
2. *Secus*, if there had not been the word "occupy" in the proviso. *Sembl.* *ib.*
3. The word "occupy" reserved the whole estate. *ib.*

### — BY HIRING AND SERVICE.

1. The servant a few days before the end of the year, for which he was hired, went away in order to get another place for the next year, without asking his master's consent: on his return before the end of the year, the master insisted on turning him away, and offered him his wages up to that time, which he accepted without making any objection; this was held to be a dissolution of the contract, and defeated the settlement, though the servant wished to stay out the year. *R. v. Inhabitants of Claybydon, Mich.* 31 *Geo.* 3. 100
2. Service under a hiring for seven years to work only 13 hours in the day, and Sundays excepted, will not give a settlement. The servant must be under the control of the master for the whole year. *R. v. Inhabitants of Kingswinford, E.* 31 *Geo.* 3. 219
3. Service for a year under an hiring "at 3*s.* per week the year round," with liberty to go on a fortnight's notice, will give a settlement. *R. v. The Inhabitants of Birdbrooke, E.* 31 *Geo.* 3. 245

4. A retrospective hiring will not give a settlement. *R. v. The Inhabitants of Marton, E.* 31 *Geo.* 3. Page 257

5. Absence at the beginning, the middle, or the end of the year, may be dispensed with, either with the consent of the master, or for an excusable cause. *R. v. The Inhabitants of East Shefford, Trin.* 32 *Geo.* 3. 806

6. And a settlement was gained, though the pauper ran away without leave, was brought back by a justice's warrant after 13 weeks absence, and then consented to have a deduction made out of his wages for that time. *ib.*

### — BY OFFICE.

1. A settlement was gained by serving the office of hog-ringer for the parish; it being stated that the pauper was chosen and sworn in at a court leet; and that it was an office of great antiquity, and serviceable to the parish. *R. v. The Inhabitants of Whittlesea, Trin.* 32 *Geo.* 3. 807
2. A settlement may be gained by serving the office of tithingman. 808
3. Or that of borsholder. *ib.*
4. Or that of ale-taster. *ib.*
5. Or that of hayward. *ib.*

### — BY TENEMENT.

1. *A.* occupied a tenement of 10*l.* a-year, and died leaving three children living, to two of whom he bequeathed 5*s.* each, and to the latter whom he made executrix, the residue of his property; the pauper who had before married the executrix, resided on the tenement above 40 days, and paid rent for it; this was held to gain him a settlement, tho' the wife never proved the will. *R. v. The Inhabitants of Netherseal, E.* 31 *Geo.* 3. 258
2. A settlement may be gained by renting the fogs or after-grass of a meadow of the yearly value of 10*l.* *R. v. The Inhabitant of Brompton, Trin.* 31 *Geo.* 3. 348
3. If the sessions draw a conclusion of fact that the taking of a tenement is fraudulent, or that it does not amount to 10*l.* per ann. it is decisive here, tho' they state all the facts, and refer the consideration of those questions



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questions to this court. *R. v. The Inhabitants of Llanrwino, Mich.* 32 Geo. 3.

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4. The pauper rented 20 cows at 3*l.* 10*s.* per annum each, and agreed with the farmer that they should be fed in particular fields for a certain part of the year, during which time no other cattle were to depasture there, it was held that he took a tenement within the 13 & 14 Car. 2. c. 12. and consequently gained a settlement by it. *R. v. The Inhabitants of Tolpuddle, E.* 32 Geo. 3. 671

### SHEEP-STEALING.

See CONVICTION, No. 2.

### SHERIFF.

1. If the sheriff appoint a special bailiff at the plaintiff's request, the latter cannot rule the sheriff to return the writ. *De Moranda v. Dunkin, Mich.* 31 Geo. 3. 119
  2. The sheriff has no authority to take a bond for the appearance of persons arrested by him under process issuing upon an indictment at the quarter sessions for a misdemeanor; he can only take a recognizance for their appearance. *Bengough v. Rossiter, Hil.* 32 Geo. 3. 505
  3. At common law the sheriff could not bail any persons indicted before justices of the peace, tho' he might bail those indicted before him at his torn. The 23 H. 6. c. 9. was passed to compel him to take bail where he might have done, and neglected to do so. But the 1 Ed. 4. c. 2. takes away his power of bailing altogether, and requires him to return all indictments taken before him at his torn to the justices at the next sessions. *ib.*
  4. A sheriff's officer is not liable to the penalties of 32 Geo. 2. c. 28. s. 1. for carrying a person taken in execution to prison within 24 hours: that clause only relating to persons arrested on mesne process. *Evans v. Atkins, Hil.* 32 Geo. 3. 555
  5. If a mob riotously and by force demolish a gaol, by which the debtors escape, the sheriff or gaoler is answerable to the creditors for their escape. *Elliot v. The Duke of Norfolk, Trin.* 32 Geo. 3. 789
- See ESCAPE. PRACTICE, No. 10. 16. 24, 25. 27.

### SHIP.

See BILL OF SALE. RATE-POOR, No. 11.

### SIMONY.

See BOND, No. 1.

### SLANDER.

1. Proof of words spoken to a person will not support an indictment, charging that the defendant spoke them of such a person. *R. v. Berry, Hil.* 31 Geo. 3. Page 217

### SMUGGLING.

1. An inhabitant of *Guernsey* cannot recover in the courts of this country the price of goods sold by him there, if he knew it to be the buyer's intention to smuggle the goods into *England*, and gave him assistance for that purpose, as in the mode of packing the goods. *Clugas v. Penaluna, Mich.* 32 Geo. 3. 466

### SOUTHWARK.

See JURISDICTION, No. 5, 6, 7.

### SPECIAL OCCUPANT.

1. If an estate *pur auter vie* be limited in trust for a man, his heirs, executors, administrators and assigns, and be not devised, it descends to the heir as a special occupant, chargeable according to the statute of frauds 29 Car. 2. c. 3.: and therefore the administratrix of the person last seized cannot recover the title deeds thereof from the heir. *Atkinson v. Baker, E.* 31 Geo. 3. 229

### SPIRITUAL COURT.

See PROHIBITION.

### STAMPS.

See SETTLEMENT BY APPRENTICESHIP, No. 2, 3. 5. 7, 8.

### STATUTES.

1. Where a subsequent act shall not be said to repeal a former one, though the terms of it be extensive enough. See TAX, No. 1, 2.
2. If



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2. If a statute expire, and afterwards be revived again by another statute, the law derives its force from the first. *Shipman v. T. v. Henbest, Mich. 31 Geo. 3. Page 109*
3. And therefore the 21 Jac. 1. c. 4. extends to statutes made since, which revive statutes made before. *ib.*
4. Where a new offence is created by an act, and a penalty annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may indict on the prior clause on the ground of a misdemeanor. *R. v. Harris, Hil. 31 Geo. 3. 202*
5. An act of parliament, which is to take effect "from and after the passing of the act" operates by legal relation from the first day of the sessions. *Lattleys v. Holmes, E. 32 Geo. 3. 660*
6. The annuity act (17 Geo. 3. c. 26.) is of this description. *ib.*
7. Though the preamble of an act cannot control the clear and positive words of the enacting part, it may explain them, if ambiguous. *Crespigny v. Wittenoom, Trin. 32 Geo. 3. 793*

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### TITLE DEEDS.

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### TOLL.

1. A claim of toll to be taken in specie for goods sold in a market is supported by evidence of a right to toll for goods brought into the market and there sold; without shewing any right to toll for goods sold in the market without being brought there. *Moseley Bart. v. Pierfon. Mich. 31 Geo. 3. 104*
2. A sale of goods in a market in such a case implies that the goods are actually there. *ib.*
3. Whether a right to take toll on goods sold by sample in a market can be supported. *Quere 107*
4. An action will not lie on the writ *de effendo quietum de theolonio* until the plaintiff's goods be distrained for toll. *Lynn Corporation v. London Corporation. Hil. 31 Geo. 3. 130*  
 See RATE-POOR, No. 3, 8, 9, 10.

### TRADE.

See INDICTMENT. No. 4.

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### TRESPASS.

1. *A.* having let his house ready furnished to *B.* cannot maintain *trespass* against the sheriff for taking the furniture under an execution against *B.* though notice were given that the goods belonged to *A.*, because *trespass* is founded on a *tort* done to the possession, which was not in *A.* at the time. *Ward v. Macauley. Mich. 32 Geo. 3. 489*
2. *Trespass* will not lie in this country for entering a house in *Canada*, because the cause of action is local. *Doulson v. Mathews. Hil. 32 Geo. 3. Page 503*  
 See PLEADING, No. 4, 5, 14, 18, 28.

### TRIAL.

See CERTIORARI, No. 6. INFORMATION.  
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### TROVER.

1. Where the owner of goods on board a vessel directed the captain not to land them on the wharf, against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea of the wharfinger's having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf, held that the owner upon demand and denial might maintain *trover* against the captain, unless the latter could establish the wharfinger's right. *Syeds v. Hay. E. 31 Geo. 3. 260*

See ASSUMPSIT, No. 1. COSTS, No. 4.

*Trust.*  
*How far law with notice it. 341.*

### VAGRANT.

See CONVICTION, No. 1.

### VARIANCE.

1. Proof that defendant's boat run down the plaintiff's in the half way reach in the *Thames* will support an allegation that the boat was run down in the *Thames*, near the half-way reach,



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- reach, in an action on the case for negligence; because the place is not material: *Aliter* if the place be material; as where a justification is local. *Drewry v. Twiss*. Hil. 32 Geo. 3. Page 558
2. So where an action on the case was brought upon an agreement that the defendant would procure the plaintiff a booth at the horse-race on *Barnet* common; and the declaration alleged *Barnet* common to be in *Middlesex*, whereas it was in *Hertford*, yet held to be surplusage, because it was immaterial to the agreement whether *Barnet* common lay in *Middlesex* or *Hertford*. *Fritth v. Gray*. Hil. 7 Geo. 3. B. R. 561
3. An averment in a declaration of the day of a former trial must exactly agree with the record to be produced in evidence to support it; though it be laid under *videlicet*. *Pope v. Foster*. E. 32 Geo. 3. 590
4. In an action against three on a promissory note, two of whom are stated to be outlawed, the third may take advantage of the misnomer of his companions upon the general issue; on the ground of a variance between the contract declared upon and that proved. *Gordon v. Austin*. E. 32 Geo. 3. 611
5. Evidence of an agreement to deliver goods to the defendant is a variance from a count on an agreement to deliver them to another person. *Leery v. Goodson*, E. 32 Geo. 3. 687
6. An agreement declared on to sell oats at so much per bushel must be taken to mean the *Winchester* bushel, and will not be proved by evidence of an agreement to sell by some other bushel. *Hockin v. Cooke*, Trin. 31 Geo. 3. 314

### VERDICT.

See INQUISITION. NEW TRIAL.

### VISITOR.

1. In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation in default of his heirs devolves upon the king, to be exercised by his great seal. *R. v. The Master and Fellows of St. Catherine's Hall, Cambridge*. E. 31 Geo. 3. 233

2. On this ground the king is the visitor of *Saint Catherine's Hall, Cambridge*; and this court refused to interfere by *mandamus* to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election. Page 233

See QUO WARRANTO INFORMATION, No. 2.

### U.

#### USAGE.

1. Contemporaneous usage may be given in evidence, in order to construe a charter. *R. v. Bellringer*. Trin. 32 Geo. 3. 821
2. Whether it can be pleaded? *quare*. *ib.*

#### USURY.

1. If the borrower of money give a bond for the principal and interest at five *per cent.* and covenant at the same time also to pay to the lender a certain portion of the profits of a trade carried on by him in partnership with another person, this is an usurious contract, and the obligee cannot recover on the bond; for though he was to gain by the profits, he was not to stand to the losses of the trade. *Morse v. Wilson*. Trin. 31 Geo. 3. 353
2. A memorandum, indorsed on a bond, which was conditioned for the payment of 100 *l.* by quarterly payments of 5 *l.* each, and interest at 5 *l. per cent.*, "that at the end of each year the year's interest due was to be added to the principal, and then the 20 *l.* received in the course of the year was to be deducted, and the balance to remain as principal", was held not to be usurious. *Le Grange v. Hamilton*. E. 32 Geo. 3. 613

### W.

1. **A** Wager on a horse-race for less than 50 *l.* cannot be recovered in an action; the *stat. 13 Geo. 2. c. 19. s. 2.* having prohibited such races. *Johnson v. Bann*. Mich. 31 Geo. 3.

WARRANT OF ATTORNEY.  
See PRISONER.

WAY, RIGHT OF.  
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## WHARFINGER.

See TROVER.

## WINCHESTER MEASURE.

See MEASURE. VARIANCE, No. 6.

## WILL.

See DEVISE. LIMITATIONS. PROBATE.

## WITNESS.

1. On an appeal against a poor-rate because certain persons were omitted to be rated, a parishioner, who is liable to be rated, but not in fact rated, is a competent witness to prove the rateability of the appellants. *R. v. T. Proffer. Mich. 31 Geo. 3. Page 17*
2. An attorney is not restrained by any rule of law from giving evidence of a conversation between him and his client touching the justice of his suit, after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to have been made by way of instruction for

conducting his cause. *Cobden v. Kendrick. Mich. 32 Geo. 3. Page 431*

3. But if any matter be disclosed to an attorney in the cause, pending the cause, he is not permitted to give it in evidence either in that, or in any other, action. *Willson v. Raffall. Trin. 32 Geo. 3. 753*
4. It is the privilege of the client and not of the attorney. *ib.*
5. But such privilege is confined to counsel, solicitors, and attornies, when acting in their respective characters. *ib.*
6. A witness may be asked whether he has not been in the pillory for perjury. *R. v. Edwards. Mich. 32 Geo. 3. 440*
7. Husbands and wives cannot in any case be witnesses either for or against each other. *Davis v. Dinwoody. E. 32 Geo. 3. 678*
8. In an action against a master for the negligence of his servant, the latter is not a competent witness to disprove the negligence without a release. *Green v. The New River Company. E. 32 Geo. 3. 589*

See EVIDENCE. HAND-WRITING.

*Words present reading from the words where the intention requires it, for the purpose of the suit.*  
 See ATTORNEY, No. 4. PRACTICE, No. 27. *as in 37, 38, 40. TOLL, No. 4. by Judge Muller.*

END OF THE FOURTH VOLUME.

